IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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BARRY MICHAELS,

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Plaintiff,

v.

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MATTHEW G. WHITAKER, IN HIS OFFICIAL CAPACITY,

Case No. 18-cv-2906

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Defendant.

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PLAINTIFF'S EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

For the reasons below and set forth in the accompanying memorandum of law, Plaintiff Barry Michaels moves to immediately enjoin Matthew G. Whitaker under Fed. R. Civ. P. 65(a), in his official capacity, to prevent him from exercising authority as Acting Attorney General, and from exercising supervisory authority over the Department of Justice's response to plaintiff's pending petition for writ of certiorari in the Supreme Court, which is due Monday. *See Michaels v. Whitaker*, No. 18-496 (S. Ct. Jun. 27, 2018).

1. Plaintiff respectfully requests that the Court consider this matter and immediately enjoin Mr. Whitaker. The Government's response to plaintiff's petition for a writ of certiorari in the Supreme Court is due Monday, and without an injunction, the Mr. Whitaker will oversee the Government's response. *See* 28 U.S.C. § 1657 (federal courts "shall expedite the consideration of . . . any action for temporary or preliminary relief"). Once filed, for the reasons stated below, plaintiff will be irreparably harmed. Indeed, it is likely in this instance that after the Government

files its response, it will argue that the issue of Mr. Whitaker's appointment is moot. The time to respond cannot be extended without prejudicing plaintiff because it would then become impossible for the Supreme Court to hear the case this Term if certiorari is granted. However, if Deputy Attorney General Rod J. Rosenstein were to consider acquiescing in the relief plaintiff seeks, plaintiff would agree to extend the deadline. Plaintiff proposes that the Government respond to this emergency motion by Thursday, December 13, at 5:00 PM, and that plaintiff file a reply by Friday, December 14, at 9:00 AM, for a hearing anytime that day thereafter. If the Court grants the preliminary injunction, it can then set a briefing schedule for full consideration of plaintiff's claims. It should not be difficult for the Government to respond on an expedited basis because they have not only a fully reasoned opinion on the issue from the Office of Legal Counsel, but also briefs in multiple cases (including this one in the Supreme Court). For the benefit of the Court and to relieve any burden on the Government, the OLC Memorandum and filing by the Solicitor General are attached *infra*.

2. For the reasons alleged in the complaint and set forth in the accompanying memorandum of law, plaintiff is entitled to injunctive relief. Plaintiff has established that Whitaker's appointment as Acting Attorney General is contrary to both the Constitution and statute; "is likely to suffer irreparable harm in the absence of preliminary relief"; and the "balance of equities" and "public interest" overwhelmingly favor enjoining Whitaker from unlawfully exercising the authority of the Nation's chief law enforcement officer. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

3. Plaintiff will suffer irreparable harm if Mr. Whitaker is permitted to supervise the Department of Justice's response to plaintiff's pending petition for a writ of certiorari in the Supreme Court. Indeed, as alleged in the complaint, Mr. Whitaker is very likely personally

involved in overseeing plaintiff's particular case, pending before the Supreme Court. But plaintiff need not prove that Mr. Rosenstein—the lawful Acting Attorney General—would make a decision that is different from Mr. Whitaker's. When it comes to an Appointments Clause violation, the fact that an unconstitutional appointee is making the decision is enough to establish the harm. *See Landry v. FDIC*, 204 F.3d 1125, 1130-32 (D.C. Cir. 2000) (collecting authorities). Indeed, multiple courts have recognized that a likely violation of the Appointments Clause constitutes irreparable harm both because the Government is largely immune from money damages, and because money damages cannot be adequate compensation for enduring an unconstitutional decisionmaking process. *See Burgess v. Fed. Deposit Ins. Corp.*, 871 F.3d 297, 304 (5th Cir. 2017); *Ironridge Glob. IV, Ltd. v. SEC*, 146 F. Supp. 3d 1294, 1317 (N.D. Ga. 2015); *Duka v. SEC*, 2015 WL 5547463, at *21 (S.D.N.Y. Sept. 17, 2015). *Compare In re al-Nashiri*, 791 F.3d 71, 79-80 (D.C. Cir. 2015) (alleged Appointments Clause violation, unaccompanied by allegations of bias or interference with the Government's deliberative process, did not give rise to irreparable harm when violations were not clear). The Attorney General has plenary authority over all federal litigation in which the Government is a party. *See, e.g.*, 28 U.S.C. §§ 510-19; 50 U.S.C. § 1804. And, notably, the Attorney General is the only official with authority to agree that a statute is unconstitutional determines when not to enforce federal statutes on the ground that they are unconstitutional. 28 U.S.C. § 530D. Plaintiff is entitled not only to litigate his petition against the proper Acting Attorney General, Rod Rosenstein, but also to have him make the determination whether to defend the statute.

4. Although not necessary for plaintiff to establish irreparable injury, it is likely that Mr. Whitaker is already directly involved in the case, given plaintiff's high-profile challenge to his authority in the Supreme Court, which has been widely reported in the press. *See, e.g.*, Devlin

Barrett, *Whitaker's Opponents Take Legal Challenge to Supreme Court*, The Washington Post (Nov. 16, 2018), https://wapo.st/2UDymKy; Associated Press, *Challenge to Matthew Whitaker's Appointment as Acting Attorney General Seeks Supreme Court Ruling* (Nov. 17, 2018), http://bit.ly/2B8JOoJ. And once the Government files its response, it is likely to argue that this issue is moot. Moreover, Mr. Whitaker is likely to be personally involved in the decisionmaking regarding the position set forth by the Department of Justice in the Supreme Court. *See, e.g.*, Jeff Murdock, *Whitaker Unveils Initiative to Stop 'Trigger-Pullers and Gun Traffickers Who Supply Them' in Memphis*, The Washington Times (Nov. 28, 2018), http://bit.ly/2rug1lY. Previous Attorney Generals have inserted themselves directly into cases involving challenges under the Second Amendment, like plaintiff's. *See, e.g.*, Linda Greenhouse, *Justice Dept. Reverses Policy on Meaning of the Second Amendment*, N.Y. Times (May 7, 2002), https://nyti.ms/2UAvi1O; Dane Eggen, *Ashcroft: Gun Ownership and Individual Right*, Washington Post (May 24, 2001). For example, former Attorney General John Ashcroft expressed positive views as to other subsections of the very statute plaintiff challenges as unconstitutional. John Ashcroft, *In re United States v. Emerson*, Office of the Attorney General (Nov. 9, 2001) ("I am pleased that the decision upholds the constitutionality of 18 U.S.C. 922(g)(8) – which prohibits violent persons who are under domestic restraining orders from possessing firearms."), *available at* http://bit.ly/2PuoWgN.

5. The balance of the equities and public interest favor an immediate injunction. *Nken v. Holder*, 556 U.S. 418, 435 (2009) (balancing the equities and considering the public interest in an injunction "merge" when "the government is the opposing party"). Courts "pay particular regard for the public consequences" of entering, or declining to enter, an injunction. *See Winter*, 555 U.S. at 20 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). In this case, the balance is overwhelmingly one-sided: the Government has no valid interest in vesting

decisionmaking authority in an unlawfully appointed official. And Mr. Rosenstein, who was confirmed by the Senate and who has seamlessly served as Acting Attorney General in various circumstances, would assume Mr. Whitaker's responsibilities for this case. On the other hand, the Solicitor General argued to the U.S. Supreme Court that the issue may never get resolved otherwise, in opposing plaintiff's motion for to substitute Rod Rosenstein in that Court. Resp. at 12, *Michaels v. Whitaker*, No. 18-496 (U.S. Nov. 26, 2018).

6. The public interest in an injunction is obvious. Assuming the correctness of plaintiff's position on the merits, Mr. Whitaker's appointment violates the Appointments Clause of the Constitution and also a federal statute, 28 U.S.C. § 508. These are bedrock legal rules regarding the organization of the government. Their violation is sufficient to tip the balance in favor of an injunction. *Edmond v. United States*, 520 U.S. 651, 659 (1997) ("[T]he Appointments Clause of Article II is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme.") (quoting *Buckley v. Valeo*, 424 U.S. 1, 125, 128-31 (1976) (per curiam)); *see Landry*, 204 F.3d at 1131 (Appointments Clause "establish[es] high walls and clear distinctions," and reversal for violation of the clause does not require "a clear causal link to a party's harm"). That concern is only heightened in this case, because Mr. Whitaker is exercising the full power of the Attorney General of the United States; every day, he makes irreversible decisions regarding federal litigation, policy, and oversight that touch on matters of life and death for many citizens and non-citizens alike. The public has a strong interest in ensuring that the individual making these important decisions is acting pursuant to lawful authority.

7. Mr. Whitaker has already shown that he is ready and willing to implement substantial changes as Acting Attorney General. Within a week of his appointment, for example, Mr. Whitaker announced an Interim Final Rule declaring that those aliens who cross the border

outside an official port of entry will be ineligible for asylum. *See Acting Attorney General Whitaker Statement on Presidential Proclamation*, U.S. Dep't of Justice (Nov. 9, 2018), http://bit.ly/2qEAO5M; *DOJ and DHS Issue New Asylum Rule*, U.S. Dep't of Justice (Nov. 8, 2018), http://bit.ly/2qFZsDb. The U.S. District Court for the Norther District of California enjoined the interim rule and the President's Proclamation—on a nationwide scale—only 10 days later, for clearly violating the Immigration and Nationalization Act. *See E. Bay Sanctuary Covenant v. Trump*, __ F. Supp. 3d__, No. 18-CV-06810-JST, 2018 WL 6053140, at *1, 20 (N.D. Cal. Nov. 19, 2018).

8. Nothing in plaintiff's proposed order would jeopardize the President's ability to remove Rosenstein if the President thinks he is wrong for the job, nor the President's authority to nominate someone else (including Whitaker) as Attorney General, subject to the advice and consent of the Senate. What the President cannot do, however, is bypass the constitutional and statutory requirements for appointing someone to that office. The stakes of this case bring into stark relief the special import of the Constitution's mandate that such confirmation be conditioned on the Senate's approval. The balance of equities and interests of the public weigh strongly in favor of granting an immediate nationwide injunction to prevent an end-run around these requirements

For the foregoing reasons, this Court should grant plaintiff's motion and enjoin Mr. Whitaker from exercising authority as Acting Attorney General and from supervising the Department of Justice's response to plaintiff's pending petition for writ of certiorari and subsequent briefing in the Supreme Court on the merits of the case

Dated: December 11, 2018

Respectfully submitted,

By: /s/ Thomas C. Goldstein

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CERTIFICATE OF SERVICE

I certify that on December 11, 2018, I caused a copy of the foregoing and all attachments filed thereto to be deposited with a third-party commercial carrier for overnight delivery, postage prepaid, addressed to the following defendant:

MATTHEW G. WHITAKER
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

/s/ Thomas C. Goldstein
Thomas C. Goldstein

INDEX OF EXHIBITS

EXHIBIT	DESCRIPTION
A	Memorandum for Emmet T. Flood, Counsel to the President, from Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, *Re: Designating an Acting Attorney General* (Nov. 14, 2018)
B	Memorandum for Respondents in Opposition to Petitioner's Motion to Substitute, No. 18-496, *Michaels v. Whitaker* (U.S. Nov. 26, 2018)

EXHIBIT A

U.S. Department of Justice
Office of Legal Counsel

Office of the Assistant Attorney General *Washington, D.C. 20530*

November 14, 2018

MEMORANDUM FOR EMMET T. FLOOD
COUNSEL TO THE PRESIDENT

Re: Designating an Acting Attorney General

After Attorney General Jefferson B. Sessions III resigned on November 7, 2018, the President designated Matthew G. Whitaker, Chief of Staff and Senior Counselor to the Attorney General, to act temporarily as the Attorney General under the Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345–3349d. This Office had previously advised that the President could designate a senior Department of Justice official, such as Mr. Whitaker, as Acting Attorney General, and this memorandum explains the basis for that conclusion.

Mr. Whitaker's designation as Acting Attorney General accords with the plain terms of the Vacancies Reform Act, because he had been serving in the Department of Justice at a sufficiently senior pay level for over a year. *See id.* § 3345(a)(3). The Department's organic statute provides that the Deputy Attorney General (or others) may be Acting Attorney General in the case of a vacancy. *See* 28 U.S.C. § 508. But that statute does not displace the President's authority to use the Vacancies Reform Act as an alternative. As we have previously recognized, the President may use the Vacancies Reform Act to depart from the succession order specified under section 508. *See Authority of the President to Name an Acting Attorney General*, 31 Op. O.L.C. 208 (2007) ("*2007 Acting Attorney General*").

We also advised that Mr. Whitaker's designation would be consistent with the Appointments Clause of the U.S. Constitution, which requires the President to obtain "the Advice and Consent of the Senate" before appointing a principal officer of the United States. U.S. Const. art. II, § 2, cl. 2. Although an Attorney General is a principal officer requiring Senate confirmation, someone who temporarily performs his duties is not. As all three branches of government have long recognized, the President may designate an acting official to perform the duties of a vacant principal office, including a Cabinet office, even when the acting official has not been confirmed by the Senate.

Congress did not first authorize the President to direct non-Senate-confirmed officials to act as principal officers in 1998; it did so in multiple statutes starting in 1792. In that year, Congress authorized the President to ensure the government's uninterrupted work by designating persons to perform temporarily the work of vacant offices. The President's authority applied to principal offices and did not require the President to select Senate-confirmed officers. In our brief survey of the history, we have identified over 160 times before 1860 in which non-Senate-confirmed persons performed, on a temporary basis, the duties of such high offices as Secretary of State, Secretary of the Treasury, Secretary of War, Secretary of the Navy, Secretary of the Interior, and Postmaster General. While designations to the office of Attorney General were less

frequent, we have identified at least one period in 1866 when a non-Senate-confirmed Assistant Attorney General served as Acting Attorney General. Mr. Whitaker's designation is no more constitutionally problematic than countless similar presidential orders dating back over 200 years.

Were the long agreement of Congress and the President insufficient, judicial precedent confirms the meaning of the Appointments Clause in these circumstances. When Presidents appointed acting Secretaries in the nineteenth century, those officers (or their estates) sometimes sought payment for their additional duties, and courts recognized the lawfulness of such appointments. The Supreme Court confirmed the legal understanding of the Appointments Clause that had prevailed for over a century in *United States v. Eaton*, 169 U.S. 331 (1898), holding that an inferior officer may perform the duties of a principal officer "for a limited time[] and under special and temporary conditions" without "transform[ing]" his office into one for which Senate confirmation is required. *Id.* at 343. The Supreme Court has never departed from *Eaton*'s holding and has repeatedly relied upon that decision in its recent Appointments Clause cases.

In the Vacancies Reform Act, Congress renewed the President's authority to designate non-Senate-confirmed senior officials to perform the functions and duties of principal offices. In 2003, we reviewed the President's authority in connection with the Director of the Officer of Management and Budget ("OMB"), who is a principal officer, and concluded that the President could designate a non-Senate-confirmed official to serve temporarily as Acting Director. *See Designation of Acting Director of the Office of Management and Budget*, 27 Op. O.L.C. 121 (2003) ("*Acting Director of OMB*"). Presidents George W. Bush and Barack Obama placed non-Senate-confirmed officials in several lines of agency succession and actually designated unconfirmed officials as acting agency heads. President Trump, too, has previously exercised that authority in other departments; Mr. Whitaker is not the first unconfirmed official to act as the head of an agency in this administration.

It is no doubt true that Presidents often choose acting principal officers from among Senate-confirmed officers. But the Constitution does not mandate that choice. Consistent with our prior opinion and with centuries of historical practice and precedents, we advised that the President's designation of Mr. Whitaker as Acting Attorney General on a temporary basis did not transform his position into a principal office requiring Senate confirmation.

I. The Vacancies Reform Act

Mr. Whitaker's designation as Acting Attorney General comports with the terms of the Vacancies Reform Act. That Act provides three mechanisms by which an acting officer may take on the functions and duties of an office, when an executive officer who is required to be appointed by the President with the advice and consent of the Senate "dies, resigns, or is otherwise unable to perform the functions and duties of the office." 5 U.S.C. § 3345(a). First, absent any other designation, the "first assistant" to the vacant office shall perform its functions and duties. *Id.* § 3345(a)(1). Second, the President may depart from that default course by directing another presidential appointee, who is already Senate confirmed, to perform the functions and duties of the vacant office. *Id.* § 3345(a)(2). Or, third, the President may designate an officer or employee within the same agency to perform the functions and duties of

the vacant office, provided that he or she has been in the agency for at least 90 days in the 365 days preceding the vacancy, in a position for which the rate of pay is equal to or greater than the minimum rate for GS-15 of the General Schedule. *Id.* § 3345(a)(3). Except in the case of a vacancy caused by sickness, the statute imposes time limits on the period during which someone may act. *Id.* § 3346. And the acting officer may not be nominated by the President to fill the vacant office and continue acting in it, unless he was already the first assistant to the office for at least 90 days in the 365 days preceding the vacancy or is a Senate-confirmed first assistant. *Id.* § 3345(b)(1)–(2); *see also Nat'l Labor Relations Bd. v. SW General, Inc.*, 137 S. Ct. 929, 941 (2017).

A.

The Vacancies Reform Act unquestionably authorizes the President to direct Mr. Whitaker to act as Attorney General after the resignation of Attorney General Sessions on November 7, 2018.[1] Mr. Whitaker did not fall within the first two categories of persons made eligible by section 3345(a). He was not the first assistant to the Attorney General, because 28 U.S.C. § 508(a) identifies the Deputy Attorney General as the "first assistant to the Attorney General" "for the purpose of section 3345." Nor did Mr. Whitaker already hold a Senate-confirmed office. Although Mr. Whitaker was previously appointed, with the advice and consent of the Senate, as the United States Attorney for the Southern District of Iowa, he resigned from that position on November 25, 2009. At the time of the resignation of Attorney General Sessions, Mr. Whitaker was serving in a position to which he was appointed by the Attorney General.

In that position, Mr. Whitaker fell squarely within the third category of officials, identified in section 3345(a)(3). As Chief of Staff and Senior Counselor, he had served in the Department of Justice for more than 90 days in the year before the resignation, at a GS-15 level or higher. And Mr. Whitaker has not been nominated to be Attorney General, an action that would render him ineligible to serve as Acting Attorney General under section 3345(b)(1). Accordingly, under the plain terms of the Vacancies Reform Act, the President could designate

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[1] Attorney General Sessions submitted his resignation "[a]t [the President's] request," Letter for President Donald J. Trump, from Jefferson B. Sessions III, Attorney General, but that does not alter the fact that the Attorney General "resign[ed]" within the meaning of section 3345(a). Even if Attorney General Sessions had declined to resign and was removed by the President, he still would have been rendered "otherwise unable to perform the functions and duties of the office" for purposes of section 3345(a). As this Office recently explained, "an officer is 'unable to perform the functions and duties of the office' during both short periods of unavailability, such as a period of sickness, and potentially longer ones, such as one resulting from the officer's removal (which would arguably not be covered by the reference to 'resign[ation].')." *Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. __, at *4 (2017); *see also Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60, 61 (1999) ("In floor debate, Senators said, by way of example, that an officer would be 'otherwise unable to perform the functions and duties of the office' if he or she were fired, imprisoned, or sick."). Indeed, any other interpretation would leave a troubling gap in the ability to name acting officers. For most Senate-confirmed offices, the Vacancies Reform Act is "the exclusive means" for naming an acting officer. 5 U.S.C. § 3347(a). If the statute did not apply in cases of removal, then it would mean that no acting officer—not even the first assistant—could take the place of a removed officer, even where the President had been urgently required to remove the officer, for instance, by concerns over national security, corruption, or other workplace misconduct.

Mr. Whitaker to serve temporarily as Acting Attorney General subject to the time limitations of section 3346.

B.

The Vacancies Reform Act remains available to the President even though 28 U.S.C. § 508 separately authorizes the Deputy Attorney General and certain other officials to act as Attorney General in the case of a vacancy.[2] We previously considered whether this statute limits the President's authority under the Vacancies Reform Act to designate someone else to be Acting Attorney General. *2007 Acting Attorney General*, 31 Op. O.L.C. 208. We have also addressed similar questions with respect to other agencies' succession statutes. *See Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. __ (2017) ("*Acting Director of CFPB*"); *Acting Director of OMB*, 27 Op. O.L.C. at 121 n.1. In those instances, we concluded that the Vacancies Reform Act is not the "exclusive means" for the temporary designation of an acting official, but that it remains available as an option to the President. We reach the same conclusion here: Section 508 does not limit the President's authority to invoke the Vacancies Reform Act to designate an Acting Attorney General.

We previously concluded that section 508 does not prevent the President from relying upon the Vacancies Reform Act to determine who will be the Acting Attorney General. Although the Vacancies Reform Act, which "ordinarily is the exclusive means for naming an acting officer," *2007 Acting Attorney General*, 31 Op. O.L.C. at 209 (citing 5 U.S.C. § 3347), makes an exception for, and leaves in effect, statutes such as section 508, "[t]he Vacancies Reform Act nowhere says that, if another statute remains in effect, the Vacancies Reform Act may not be used." *Id.* In fact, the structure of the Vacancies Reform Act makes clear that office-specific provisions are treated as exceptions from its generally exclusive applicability, not as provisions that supersede the Vacancies Reform Act altogether.[3] Furthermore, as we noted, "the Senate Committee Report accompanying the Act expressly disavows" the view that, where another statute is available, the Vacancies Reform Act may not be used. *Id.* (citing S. Rep. No. 105-250, at 17 (1998)). That report stated that, "with respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the Vacancies [Reform] Act would continue to provide an alternative procedure for temporarily occupying the office." *Id.* We therefore concluded that the President could direct the Assistant Attorney General for the Civil Division to act as Attorney General under the Vacancies Reform Act, even though the incumbent Solicitor General would otherwise have served under the chain of succession specified in section 508 (as supplemented by an Attorney General order).

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[2] Under 28 U.S.C. § 508(a), in the case of a vacancy in the office of Attorney General, "the Deputy Attorney General may exercise all the duties of that office, and for the purpose of [the Vacancies Reform Act] the Deputy Attorney General is the first assistant to the Attorney General." If the offices of Attorney General and Deputy Attorney General are both vacant, "the Associate Attorney General shall act as Attorney General," and "[t]he Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General." *Id.* § 508(b).

[3] One section (entitled "Exclusion of certain offices") is used to exclude certain offices altogether. 5 U.S.C. § 3349c. Office-specific statutes, however, are mentioned in a different section (entitled "Exclusivity") that generally makes the Vacancies Reform Act "the exclusive means" for naming an acting officer but also specifies exceptions to that exclusivity. *Id.* § 3347(a)(1).

At the time of our *2007 Acting Attorney General* opinion, the first two offices specified in section 508(a) and (b)—Deputy Attorney General and Associate Attorney General—were both vacant. *See* 31 Op. O.L.C. at 208. That is not currently the case; there is an incumbent Deputy Attorney General. But the availability of the Deputy Attorney General does not affect the President's authority to invoke section 3345(a)(3). Nothing in section 508 suggests that the Vacancies Reform Act does not apply when the Deputy Attorney General can serve. To the contrary, the statute expressly states that the Deputy Attorney General is the "first assistant to the Attorney General" "for the purpose of section 3345 of title 5" (i.e., the provision of the Vacancies Reform Act providing for the designation of an acting officer). 28 U.S.C. § 508(a). It further provides that the Deputy Attorney General "may" serve as Acting Attorney General, not that he "must," underscoring that the Vacancies Reform Act remains an alternative means of appointment.[4] These statutory cross-references confirm that section 508 works in conjunction with, and does not displace, the Vacancies Reform Act.

Although the Deputy Attorney General is the default choice for Acting Attorney General under section 3345(a)(1), the President retains the authority to invoke the other categories of eligible officials, "notwithstanding [the first-assistant provision in] paragraph (1)." 5 U.S.C. § 3345(a)(2), (3). Moreover, there is reason to believe that Congress, in enacting the Vacancies Reform Act, deliberately chose to make the second and third categories of officials in section 3345(a) applicable to the office of Attorney General. Under the previous Vacancies Act, the first assistant to an office was also the default choice for filling a vacant Senate-confirmed position, and the President was generally able to depart from that by selecting another Senate-confirmed officer. *See* 5 U.S.C. § 3347 (1994). That additional presidential authority, however, was expressly made inapplicable "to a vacancy in the office of Attorney General." *Id.*; *see also* Rev. Stat. § 179 (2d ed. 1878). Yet, when Congress enacted the Vacancies Reform Act in 1998, it did away with the exclusion for the office of Attorney General. *See* 5 U.S.C. § 3349c (excluding certain other officers).[5]

Our conclusion that the Vacancies Reform Act remains available, notwithstanding section 508, is consistent with our prior opinions. In *Acting Director of OMB*, we recognized that an OMB-specific statute, 31 U.S.C. § 502(f), did not displace the President's authority under the Vacancies Reform Act. *See* 27 Op. O.L.C. at 121 n.1 ("The Vacancies Reform Act does not provide, however, that where there is another statute providing for a presidential designation, the Vacancies Reform Act becomes unavailable."). More recently, we confirmed that the President could designate an Acting Director of the Bureau of Consumer Financial Protection ("CFPB"),

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[4] We do not mean to suggest that a different result would follow if section 508 said "shall" instead of "may," since as discussed at length in *Acting Director of CFPB*, such mandatory phrasing in a separate statute does not itself oust the Vacancies Reform Act. *See* 41 Op. O.L.C. __, *7–9 & n.3. The point is that, in contrast with the potential ambiguity arising from the appearance of "shall" in the CFPB-specific statute, section 508 expressly acknowledges that the Deputy Attorney General is the first assistant but will not necessarily serve in the case of a vacancy in the office of Attorney General.

[5] When it reported the Vacancies Reform Act, the Senate Committee on Governmental Affairs contemplated that the Attorney General would continue to be excluded by language in a proposed section 3345(c) that would continue to make section 508 "applicable" to the office. *See* S. Rep. No. 105-250, at 13, 25; 144 Cong. Rec. 12,433 (June 16, 1998). But that provision "was not enacted as part of the final bill, and no provision of the Vacancies Reform Act bars the President from designating an Acting Attorney General under that statute." *2007 Acting Attorney General*, 31 Op. O.L.C. at 209 n.1.

notwithstanding 12 U.S.C. § 5491(b)(5), which provides that the Deputy Director of the CFPB "shall" serve as Acting Director when the Director is unavailable. *See Acting Director of CFPB*, 41 Op. O.L.C. __. We reasoned that the CFPB-specific statute should "interact with the Vacancies Reform Act in the same way as other, similar statutes providing an office-specific mechanism for an individual to act in a vacant position." *Id.* at *7–9 & n.3. We noted that the Vacancies Reform Act itself provides that a first assistant to a vacant office "shall perform the functions and duties" of that office unless the President designates someone else to do so, 5 U.S.C. § 3345(a), and that mandatory language in either the CFPB-specific statute or the Vacancies Reform Act does not foreclose the availability of the other statute. *Acting Director of CFPB*, 41 Op. O.L.C. __, at *7–8.

Courts have similarly concluded that the Vacancies Reform Act remains available as an alternative to office-specific statutes. *See Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 555–56 (9th Cir. 2016) (General Counsel of the National Labor Relations Board, which has its own office-specific statute prescribing a method of filling a vacancy); *English v. Trump*, 279 F. Supp. 3d 307, 323–24 (D.D.C. 2018) (holding that the mandatory language in the CFPB-specific statute is implicitly qualified by the Vacancies Reform Act's language providing that the President also "may direct" qualifying individuals to serve in an acting capacity), *appeal dismissed upon appellant's motion*, No. 18-5007, 2018 WL 3526296 (D.C. Cir. July 13, 2018).

For these reasons, we believe that the President could invoke the Vacancies Reform Act in order to designate Mr. Whitaker as Acting Attorney General ahead of the alternative line of succession provided under section 508.

II. The Appointments Clause

While the Vacancies Reform Act expressly authorizes the President to select an unconfirmed official as Acting Attorney General, Congress may not authorize an appointment mechanism that would conflict with the Constitution. *See Freytag v. Commissioner*, 501 U.S. 868, 883 (1991). The Appointments Clause requires the President to "appoint" principal officers, such as the Attorney General, "by and with the Advice and Consent of the Senate." U.S. Const., art. II, § 2, cl. 2. But for "inferior Officers," Congress may vest the appointment power "in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.*

The President's designation of Mr. Whitaker as Acting Attorney General is consistent with the Appointments Clause so long as Acting Attorney General is not a principal office that requires Senate confirmation. If so, it does not matter whether an acting official temporarily filling a vacant principal office is an inferior officer or not an "officer" at all within the meaning of the Constitution, because Mr. Whitaker was appointed in a manner that satisfies the requirements for an inferior officer: He was appointed by Attorney General Sessions, who was the Head of the Department, and the President designated him to perform additional duties. *See Acting Director of OMB*, 27 Op. O.L.C. at 124–25. If the designation constituted an appointment to a principal office, however, then section 3345(a)(3) would be unconstitutional as applied, because Mr. Whitaker does not currently occupy a position requiring Senate confirmation.

For the reasons stated below, based on long-standing historical practice and precedents, we do not believe that the Appointments Clause may be construed to require the Senate's advice and consent before Mr. Whitaker may be Acting Attorney General.

A.

The Attorney General is plainly a principal officer, who must be appointed with the advice and consent of the Senate. *See Edmond v. United States*, 520 U.S. 651, 662–63 (1997); *Morrison v. Olson*, 487 U.S. 654, 670–72 (1988). The Attorney General has broad and continuing authority over the federal government's law-enforcement, litigation, and other legal functions. *See, e.g.*, 28 U.S.C. §§ 516, 533. The Supreme Court has not "set forth an exclusive criterion for distinguishing between" inferior officers and principal officers. *Edmond*, 520 U.S. at 661. "Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President." *Id.* at 662. There is no officer below the President who supervises the Attorney General.

Although the Attorney General is a principal officer, it does not follow that an Acting Attorney General should be understood to be one. An office under the Appointments Clause requires both a "continuing and permanent" position and the exercise of "significant authority pursuant to the laws of the United States." *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (internal quotation marks omitted); *see also Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 74 (2007). While a person acting as the Attorney General surely exercises sufficient authority to be an "Officer of the United States," it is less clear whether Acting Attorney General is a principal office.

Because that question involves the division of powers between the Executive and the Legislative Branches, "historical practice" is entitled to "significant weight." *Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014); *see also, e.g.*, *The Pocket Veto Case*, 279 U.S. 655, 689 (1929). That practice strongly supports the constitutionality of authorizing someone who has not been Senate-confirmed to serve as an acting principal officer. Since 1792, Congress has repeatedly legislated on the assumption that temporary service as a principal officer does not require Senate confirmation. As for the Executive Branch's practice, our non-exhaustive survey has identified over 160 occasions between 1809 and 1860 on which non-Senate-confirmed persons served temporarily as an acting or ad interim principal officer in the Cabinet.

Furthermore, judicial precedents culminating in *United States v. Eaton*, 169 U.S. 331 (1898), endorsed that historical practice and confirm that the temporary nature of acting service weighs against principal-officer status. The Supreme Court in *Eaton* held that an inferior officer may perform the duties of a principal officer "for a limited time[] and under special and temporary conditions" without "transform[ing]" his office into one for which Senate confirmation is required. *Id.* at 343. That holding was not limited to the circumstances of that case, but instead reflected a broad consensus about the status of an acting principal officer that the Supreme Court has continued to rely on in later Appointments Clause decisions.

1.

Since the Washington Administration, Congress has "authoriz[ed] the President to direct certain officials to temporarily carry out the duties of a vacant PAS office [i.e., one requiring Presidential Appointment and Senate confirmation] in an acting capacity, without Senate confirmation." *SW General*, 137 S. Ct. at 934; *see also Noel Canning*, 134 S. Ct. at 2609 (Scalia, J., dissenting in relevant part) (observing that the President does not need to use recess appointments to fill vacant offices because "Congress can authorize 'acting' officers to perform the duties associated with a temporarily vacant office—and has done that, in one form or another, since 1792"). Those statutes, and evidence of practice under them during the early nineteenth century, did not limit the pool of officials eligible to serve as an acting principal officer to those who already have Senate-confirmed offices. This history provides compelling support for the conclusion that the position of an *acting* principal officer is not itself a principal office.

In 1792, Congress first "authorized the appointment of 'any person or persons' to fill specific vacancies in the Departments of State, Treasury, and War." *SW General*, 137 S. Ct. at 935 (quoting Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281). Although the statute expressly mentioned vacancies in the position of Secretary in each of those Departments, the President was authorized to choose persons who held no federal office at all—much less one requiring Senate confirmation. Although the 1792 statute "allowed acting officers to serve until the permanent officeholder could resume his duties or a successor was appointed," Congress "imposed a six-month limit on acting service" in 1795. *Id.* at 935 (citing Act of Feb. 13, 1795, ch. 21, 1 Stat. 415). In 1863, in response to a plea from President Lincoln, *see* Message to Congress (Jan. 2, 1863), Cong. Globe, 37th Cong., 3d Sess. 185 (1863), Congress extended the provision to permit the President to handle a vacancy in the office of "the head of any Executive Department of the Government, or of any officer of either of the said Departments whose appointment is not in the head thereof." Act of Feb. 20, 1863, ch. 45, § 1, 12 Stat. 656, 656. The 1863 statute allowed the duties of a vacant office to be performed for up to six months by "the head of any other Executive Department" or by any other officer in those departments "whose appointment is vested in the President." *Id.*

In 1868, Congress replaced all previous statutes on the subject of vacancies with the Vacancies Act of 1868. *See* Act of July 23, 1868, ch. 227, 15 Stat. 168. That act provided that, "in case of the death, resignation, absence, or sickness of the head of any executive department of the government, the first or sole assistant thereof shall . . . perform the duties of such head until a successor be appointed or the absence or sickness shall cease." *Id.*, § 1, 15 Stat. at 168. In lieu of elevating the "first or sole assistant," the President could also choose to authorize any other officer appointed with the Senate's advice and consent to perform the duties of the vacant office until a successor was appointed or the prior occupant of the position was able to return to his post. *Id.* § 3, 15 Stat. at 168. In cases of death or resignation, an acting official could serve for no longer than ten days. *Id.* The 1868 act thus eliminated the President's prior discretion to fill a vacant office temporarily with someone who did not hold a Senate-confirmed position. Yet, it preserved the possibility that a non-Senate-confirmed first assistant would serve as an acting head of an executive department.

Over the next 120 years, Congress repeatedly amended the Vacancies Act of 1868, but it never eliminated the possibility that a non-Senate-confirmed first assistant could serve as an acting head of an executive department. In 1891, it extended the time limit for acting service in cases of death or resignation from ten to thirty days. Act of Feb. 6, 1891, ch. 113, 26 Stat. 733. In 1966, it made minor changes during the course of re-codifying and enacting title 5 of the United States Code. *See* S. Rep. No. 89-1380, at 20, 70–71 (1966); 5 U.S.C. §§ 3345–3349 (1970). Congress amended the act once more in 1988, extending the time limit on acting service from 30 to 120 days and making the statute applicable to offices that are not in "Departments" and thus are less likely to have Senate-confirmed first assistants. Pub. L. No. 100-398, § 7(b), 102 Stat. 985, 988 (1988).

Accordingly, for more than two centuries before the Vacancies Reform Act, Congress demonstrated its belief that the Appointments Clause did not require Senate confirmation for temporary service in a principal office, by repeatedly enacting statutes that affirmatively authorized acting service—even in principal offices at the heads of executive departments—by persons who did not already hold an appointment made with the Senate's advice and consent.

2.

Not only did Congress authorize the Presidents to select officials to serve temporarily as acting principal officers, but Presidents repeatedly exercised that power to fill temporarily the vacancies in their administrations that arose from resignations, terminations, illnesses, or absences from the seat of government. In providing this advice, we have not canvassed the entire historical record. But we have done enough to confirm that Presidents often exercised their powers under the 1792 and 1795 statutes to choose persons who did not hold any Senate-confirmed position to act temporarily as principal officers in various departments. In the Washington, Adams, and Jefferson Administrations, other Cabinet officers (or Chief Justice John Marshall) were used as temporary or "ad interim" officials when offices were vacant between the departure of one official and the appointment of his successor. *See, e.g.*, *Biographical Directory of the American Congress, 1774–1971*, at 13–14 (1971); *see id.* at 12 (explaining that the list of Cabinet officers excludes "[s]ubordinates acting temporarily as heads of departments" and therefore lists only those who served ad interim after an incumbent's departure).

President Jefferson made the first designation we have identified of a non-Senate-confirmed officer to serve temporarily in his Cabinet. On February 17, 1809, approximately two weeks before the end of the Jefferson Administration, John Smith, the chief clerk of the Department of War, was designated to serve as Acting Secretary of War. *See id.* at 14; Letter from Thomas Jefferson to the War Department (Feb. 17, 1809), *Founders Online*, National Archives, https://founders.archives.gov/documents/Jefferson/99-01-02-9824 ("Whereas, by the resignation of Henry Dearborne, late Secretary at War, that office is become vacant. I therefore do hereby authorize John Smith, chief clerk of the office of the Department of War, to perform the duties of the said office, until a successor be appointed."). As chief clerk, Smith was not a principal officer. He was instead "an inferior officer . . . appointed by the [Department's] principal officer." Act of Aug. 5, 1789, ch. 6, § 2, 1 Stat. 49, 50. The next Secretary of War did not enter upon duty until April 8, 1809, five weeks after the beginning of the Madison Administration. *See Biographical Directory* at 14.

Between 1809 and 1860, President Jefferson's successors designated a non-Senate-confirmed officer to serve as an acting principal officer in a Cabinet position on at least 160 other occasions. We have identified 109 additional instances during that period where chief clerks, who were not Senate confirmed, temporarily served as ad interim Secretary of State (on 51 occasions), Secretary of the Treasury (on 36 occasions), or Secretary of War (on 22 occasions). *See id.* at 15–19; 1 *Trial of Andrew Johnson, President of the United States, Before the Senate of the United States, on Impeachment by the House of Representatives for High Crimes and Misdemeanors*, 575–81, 585–88, 590–91 (Washington, GPO 1868); *In re Asbury Dickins*, 34th Cong., 1st Sess., Rep. C.C. 9, at 4–5 (Ct. Cl. 1856) (listing 18 times between 1829 and 1836 that chief clerk Asbury Dickins was "appointed to perform the duties of Secretary of the Treasury" or Secretary of State "during the absence from the seat of government or sickness" of those Secretaries, for a total of 359 days).[6] Between 1853 and 1860 there were also at least 21 occasions on which non-Senate-confirmed Assistant Secretaries were authorized to act as Secretary of the Treasury.[7]

We have also identified instances involving designations of persons who apparently had no prior position in the federal government, including Alexander Hamilton's son, James A. Hamilton, whom President Jackson directed on his first day in office to "take charge of the Department of State until Governor [Martin] Van Buren should arrive in the city" three weeks later. 1 *Trial of Andrew Johnson* at 575; *see Biographical Directory* at 16. President Jackson also twice named William B. Lewis, who held no other government position, as acting Secretary of War. *See* 1 *Trial of Andrew Johnson* at 575. Moving beyond the offices expressly covered by the 1792 and 1795 statutes, there were at least 23 additional instances before 1861 in which Presidents authorized a non-Senate-confirmed chief clerk to perform temporarily the duties of the Secretary of the Navy (on 21 occasions), or the Secretary of the Interior (on 2 occasions).[8]

At the time, it was well understood that when an Acting or ad interim Secretary already held an office such as chief clerk, he was not simply performing additional duties, but he was deemed the Acting Secretary. We know this, because the chief clerks sometimes sought

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[6] *See also* Act of July 27, 1789, ch. 4, § 2, 1 Stat. 28, 29 (providing that the chief clerk in what became the Department of State was "an inferior officer, to be appointed by the [Department's] principal officer"); Act of Sept. 2, 1789, ch. 12, § 1, 1 Stat. 65, 65 (providing for an "Assistant to the Secretary of the Treasury," later known as the chief clerk, who "shall be appointed by the said Secretary"). The sources cited in the text above indicate that (1) the following chief clerks served as ad interim Secretary of State: Aaron Ogden Dayton, Aaron Vail (twice), Asbury Dickins (ten times), Daniel Carroll Brent (five times), Daniel Fletcher Webster, Jacob L. Martin (three times), John Appleton, John Graham, Nicholas Philip Trist (four times), Richard K. Cralle, William S. Derrick (fifteen times), William Hunter (seven times); (2) the following chief clerks served as ad interim Secretary of the Treasury: Asbury Dickins (eight times), John McGinnis, and McClintock Young (twenty-seven times); and (3) the following chief clerks (or acting chief clerks) served as ad interim Secretary of War: Albert Miller Lee, Archibald Campbell (five times), Christopher Vandeventer, George Graham, John D. McPherson, John Robb (six times), Philip G. Randolph (five times), Samuel J. Anderson, and William K. Drinkard.

[7] *See* 1 *Trial of Andrew Johnson* at 580–81, 590–91 (entries for William L. Hodge and Peter Washington); Act of Mar. 3, 1849, ch. 108, § 13, 9 Stat. 395, 396–97 (providing for appointment by the Secretary of an "Assistant Secretary of the Treasury").

[8] *See Biographical Directory* at 14–17 (chief clerks of the Navy in 1809, 1814–15, 1829, 1831, and 1841); *id.* at 18 (chief clerk of the Department of the Interior, Daniel C. Goddard, in 1850 (twice)); *In re Cornelius Boyle*, 34th Cong., 3d Sess., Rep. C.C. 44, at 3, 12–13 (Ct. Cl. 1857) (identifying 13 times between 1831 and 1838 that chief clerk John Boyle was appointed as Acting Secretary of the Navy, for a total of 466 days).

payment for the performance of those additional duties. Attorney General Legaré concluded that Chief Clerk McClintock Young had a claim for compensation as "Secretary of the Treasury *ad interim*." *Pay of Secretary of the Treasury ad Interim*, 4 Op. Att'y Gen. 122, 122–23 (1842). And the Court of Claims later concluded that Congress should appropriate funds to compensate such officers for that service. *See, e.g.*, *In re Cornelius Boyle*, 34th Cong., 3d Sess., Rep. C.C. 44, at 9, 1857 WL 4155, at *4 (Ct. Cl. 1857) ("The office of Secretary *ad interim* being a distinct and independent office in itself, when it is conferred on the chief clerk, it is so conferred not because it pertains to him *ex officio*, but because the President, in the exercise of his discretion, sees fit to appoint him[.]"); *Dickins*, 34 Cong. Rep. C.C. 9, at 16, 1856 WL 4042, at *3.

Congress not only acquiesced in such appointments, but also required a non-Senate-confirmed officer to serve as a principal officer in some instances. In 1810, Congress provided that in the case of a vacancy in the office of the Postmaster General, "all his duties shall be performed by his senior assistant." Act of Apr. 30, 1810, ch. 37, § 1, 2 Stat. 592, 593. The senior assistant was one of two assistants appointed by the Postmaster General. *Id.* When Congress reorganized the Post Office in 1836, it again required that the powers and duties of the Postmaster General would, in the case of "death, resignation, or absence" "devolve, for the time being on the First Assistant Postmaster General," who was still an appointee of the Postmaster General. Act of July 2, 1836, ch. 270, § 40, 5 Stat. 80, 89. On four occasions before 1860, a First Assistant Postmaster General served as Postmaster General ad interim. *See Biographical Directory* at 17–19 (in 1841 (twice), 1849, and 1859).

On the eve of the Civil War in January 1861, President Buchanan summarized the Chief Executive's view of his authority to designate interim officers in a message submitted to Congress to explain who had been performing the duties of the Secretary of War:

> The practice of making . . . appointments [under the 1795 statute], whether in a vacation or during the session of Congress, has been constantly followed during every administration from the earliest period of the government, and *its perfect lawfulness has never, to my knowledge, been questioned or denied.* Without going back further than the year 1829, and without taking into the calculation any but the chief officers of the several departments, it will be found that provisional appointments to fill vacancies were made to the number of one hundred and seventy-nine . . . . Some of them were made while the Senate was in session, some which were made in vacation were continued in force long after the Senate assembled. *Sometimes, the temporary officer was the commissioned head of another department, sometimes a subordinate in the same department.*

Message from the President of the United States, 36th Cong., 2d Sess., Exec. Doc. No. 2, at 1–2 (1861) (emphases added).

3.

When it comes to vacancy statutes, the office of Attorney General presents an unusual case, albeit not one suggesting any different constitutional treatment. The office was established in the Judiciary Act of 1789, *see* Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 93, and the Attorney General was a member of the President's Cabinet, *see Office and Duties of Attorney*

General, 6 Op. Att'y Gen. 326, 330 (1854). But the Attorney General did not supervise an "executive department," and the Department of Justice was not established until 1870. *See* Act of June 22, 1870, ch. 150, § 1, 16 Stat. 162, 162. Thus, the terms of the 1792, 1795, and 1863 statutes, and of the Vacancies Act of 1868, did not expressly apply to vacancies in the office of the Attorney General.

Even so, the President made "temporary appointment[s]" to the office of Attorney General on a number of occasions. In 1854, Attorney General Cushing noted that "proof exists in the files of the department that temporary appointment has been made by the President in that office." *Office and Duties of Attorney General*, 6 Op. Att'y Gen. at 352. Because the 1792 and 1795 statutes did not provide the President with express authority for those temporary appointments, Cushing believed it "questionable" whether the President had the power, but he also suggested that "[p]erhaps the truer view of the question is to consider the two statutes as declaratory only, and to assume that the power to make such temporary appointment is a constitutional one." *Id.* Cushing nonetheless recommended the enactment of "a general provision . . . to remove all doubt on the subject" for the Attorney General and "other non-enumerated departments." *Id.*

Congress did not immediately remedy the problem that Cushing identified, but Presidents designated Acting Attorneys General, both before and after the Cushing opinion. In some instances, the President chose an officer who already held another Senate-confirmed office. *See Acting Attorneys General*, 8 Op. O.L.C. 39, 40–41 (1984) (identifying instances in 1848 and 1868 involving the Secretary of the Navy or the Secretary of the Interior).[9] In other instances, however, non-Senate-confirmed individuals served. After the resignation of Attorney General James Speed, for instance, Assistant Attorney General J. Hubley Ashton was the ad interim Attorney General from July 17 to July 23, 1866. *See id.* at 41; *Biographical Directory* at 20. At the time, the Assistant Attorney General was appointed by the Attorney General alone. *See* Act of March 3, 1859, ch. 80, 11 Stat. 410, 420 ("[T]he Attorney-General … is hereby[] authorized to appoint one assistant in the said office, learned in the law, at an annual salary of three thousand dollars[.]").[10]

On other occasions between 1859 and 1868, Ashton and other Assistant Attorneys General who had not been Senate confirmed also signed several formal legal opinions as "Acting Attorney General," presumably when their incumbent Attorney General was absent or otherwise

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[9] This list is almost certainly under-inclusive because the published sources we have located identify only those who were Acting Attorney General during a period between the resignation of one Attorney General and the appointment of his successor. They do not identify individuals who may have performed the functions and duties of Attorney General when an incumbent Attorney General was temporarily unavailable on account of an absence or sickness that would now trigger either 28 U.S.C. § 508(a) or 5 U.S.C. § 3345(a).

[10] In 1868, Congress created two new Assistant Attorneys General positions to be "appointed by the President, by and with the advice and consent of the Senate," and specified that those positions were "in lieu of," among others, "the assistant attorney-general now provided for by law," which was "abolished" effective on July 1, 1868. Act of June 25, 1868, ch. 71, § 5, 15 Stat. 75, 75. A few weeks later, Ashton was confirmed by the Senate as an Assistant Attorney General. *See* 18 Sen. Exec. J. 369 (July 25, 1868). He was therefore holding a Senate-confirmed office when he served another stint as Acting Attorney General for several days at the beginning of the Grant Administration in March 1869, *see Biographical Directory* at 21, and when he signed five opinions as "Acting Attorney General" in September and October 1868.

unavailable. *See Case of Colonel Gates*, 11 Op. Att'y Gen. 70, 70 (1864) (noting that the question from the President "reached this office in [the Attorney General's] absence").[11] In 1873, when Congress reconciled the Vacancies Act of 1868 with the Department of Justice's organic statute, it expressly excepted the office of Attorney General from the general provision granting the President power to choose who would temporarily fill a vacant Senate-confirmed office. *See* Rev. Stat. § 179 (1st ed. 1875). There is accordingly no Attorney General-specific practice with respect to the pre-1998 statutes.

B.

Well before the Supreme Court's foundational decision in *Eaton* in 1898, courts approved of the proposition that acting officers are entitled to payment for services during their temporary appointments as principal officers. *See, e.g.*, *United States v. White*, 28 F. Cas. 586, 587 (C.C.D. Md. 1851) (Taney, Circuit J.) ("[I]t often happens that, in unexpected contingencies, and for temporary purposes, the appointment of a person already in office, to execute the duties of another office, is more convenient and useful to the public, than to bring in a new officer to execute the duty."); *Dickins*, 34 Cong. Rep. C.C. 9, at 17, 1856 WL 4042, at *3 (finding a chief clerk was entitled to additional compensation "for his services[] as acting Secretary of the Treasury and as acting Secretary of State"). Most significantly, in *Boyle*, the Court of Claims concluded that the chief clerk of the Navy (who was not Senate confirmed) had properly served as Acting Secretary of the Navy on an intermittent basis over seven years for a total of 466 days. 34 Cong. Rep. C.C. 44, at 8, 1857 WL 4155, at *1–2 (1857). The court expressly addressed the Appointments Clause question and distinguished, for constitutional purposes, between the office of Secretary of the Navy and the office of Acting Secretary of the Navy. *Id.* at 8, 1857 WL 4155 at *3 ("It seems to us . . . plain that the office of Secretary *ad interim* is a distinct and independent office in itself. It is not the office of Secretary[.]"). Furthermore, the court emphasized, the defining feature of the office of Secretary ad interim was its "temporary" character, and it must therefore be considered an inferior office:

> Congress has exercised the power of vesting the appointment of a Secretary *ad interim* in the President alone, and we think, in perfect consistency with the Constitution of the United States. We do not think that there can be any doubt that he is an *inferior* officer, in the sense of the Constitution, whose appointment may be vested by Congress in the President alone.

Id.

When the Supreme Court addressed this Appointments Clause issue in 1898, it reached a similar conclusion. In *United States v. Eaton*, the Court considered whether Congress could authorize the President alone to appoint a subordinate officer "charged with the duty of temporarily performing the functions" of a principal officer. 169 U.S. at 343. The statute

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[11] There were two additional opinions signed by Ashton as "Acting Attorney General" in 1864 and 1865 (11 Op. Att'y Gen. 482; 11 Op. Att'y Gen. 127); as well as four signed as "Acting Attorney General" by Assistant Attorney General John Binckley in 1867 (12 Op. Att'y Gen. 231; 12 Op. Att'y Gen. 229; 12 Op. Att'y Gen 222; 12 Op. Att'y Gen. 227); two signed as "Acting Attorney General" by Assistant Attorney General Titian J. Coffey in 1862 and 1863 (10 Op. Att'y Gen. 492; 10 Op. Att'y Gen. 377); and one signed as "Acting Attorney General" by Assistant Attorney General Alfred B. McCalmont in 1859 (9 Op. Att'y Gen. 389).

authorized the President "to provide for the appointment of vice-consuls . . . in such a manner and under such regulations as he shall deem proper." *Id.* at 336 (quoting Rev. Stat. § 1695 (2d ed. 1878)). The President's regulation provided that "[i]n case a vacancy occurs in the offices both of the consul and the vice-consul, which requires the appointment of a person to perform temporarily the duties of the consulate, the diplomatic representative has authority to make such appointment, with the consent of the foreign government . . . immediate notice being given to the Department of State." *Id.* at 338 (quoting regulation). Pursuant to that authority, Sempronius Boyd, who was the diplomatic representative and consul-general to Siam, appointed Lewis Eaton (then a missionary who was not employed by the government) as a vice-consul-general and directed him to take charge of the consulate after Boyd's departure. *Id.* at 331–32. With the "knowledge" and "approval" of the Department of State, Eaton remained in charge of the consulate, at times calling himself "acting consul-general of the United States at Bangkok," from July 12, 1892, until a successor vice-consul-general arrived on May 18, 1893. *Id.* at 332–33. In a dispute between Boyd's widow and Eaton over salary payments, the Court upheld Eaton's appointment, and the underlying statutory scheme, against an Appointments Clause challenge. *Id.* at 334–35, 352.

The Constitution expressly includes "Consuls" in the category of officers whose appointment requires the Senate's advice and consent. U.S. Const. art. II, § 2, cl. 2. The *Eaton* Court, however, concluded that a "vice-consul" is an inferior officer whose appointment Congress may "vest in the President" alone. 169 U.S. at 343. The Court held that Eaton's exercise of the authority of a Senate-confirmed office did not transform him into an officer requiring Senate confirmation:

> Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official. To so hold would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered.

Id. The Court concluded that more than forty years of practice "sustain the theory that a vice-consul is a mere subordinate official," which defeated the contention that Eaton's appointment required Senate confirmation. *Id.* at 344. In so doing, the Court cited Attorney General Cushing's 1855 opinion about appointments of consular officials, which had articulated the parameters for that practice. *See id.*[12] Significantly, the Court also made clear that its holding was not limited to vice-consuls or to the exigencies of Eaton's particular appointment. Rather, the Court emphasized that the temporary performance of a principal office is not the same as holding that office itself. The Court feared that a contrary holding would bear upon "any and every delegation of power to an inferior to perform *under any circumstances or exigency*." *Id.* at

[12] In the 1855 opinion, Attorney General Cushing explained that a vice-consul is "the person employed to fill the [consul's] place temporarily in his absence." *Appointment of Consuls*, 7 Op. Att'y Gen. 242, 262 (1855). He noted that consuls had to be Senate-confirmed, but vice-consuls were regarded as the "subordinates of consuls" and therefore did not require "nomination to the Senate." *Id.* at 247.

343 (emphasis added). In view of the long history of such appointments, *Eaton* simply confirmed the general rule. It did not work any innovation in that practice.

The Court has not retreated from *Eaton*, or narrowed its holding, but instead has repeatedly cited the decision for the proposition that an inferior officer may temporarily perform the duties of a principal officer without Senate confirmation. In *Edmond*, the Court observed that "'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." 520 U.S. at 663. But the Court also observed that there is no "exclusive criterion for distinguishing between principal and inferior officers" and restated *Eaton*'s holding that "a vice consul charged temporarily with the duties of the consul" is an "inferior" officer. *Id.* at 661. In *Morrison*, the Court emphasized that a subordinate who performed a principal officer's duties "for a limited time and under special and temporary conditions" is not "thereby transformed into the superior and permanent official," and explained that a vice-consul appointed during the consul's "temporary absence" remained a "subordinate officer notwithstanding the Appointment Clause's specific reference to 'Consuls' as principal officers." 487 U.S. at 672–73 (quoting *Eaton*, 169 U.S. at 343)). Justice Scalia's dissenting opinion in *Morrison* similarly described *Eaton* as holding that "the appointment by an Executive Branch official other than the President of a 'vice-consul,' charged with the duty of temporarily preforming the function of the consul, did not violate the Appointments Clause." *Id.* at 721 (Scalia, J., dissenting). Likewise, in his dissenting opinion in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 537 F.3d 667 (D.C. Cir. 2008), *aff'd in part and rev'd in part*, 561 U.S. 447 (2010), then-Judge Kavanaugh cited *Eaton* to establish that "[t]he temporary nature of the office is the . . . reason that *acting* heads of departments are permitted to exercise authority without Senate confirmation." *Id.* at 708 n.17 (Kavanaugh, J. dissenting). Notably, Judge Kavanaugh also cited our 2003 opinion, which concluded that an OMB official who was not Senate confirmed could serve as Acting Director of OMB. *See id.* (citing *Acting Director of OMB*, 27 Op. O.L.C. at 123).

In *SW General*, the Court acknowledged the long history of Acts of Congress permitting the President to authorize officials to temporarily perform the functions of vacant offices requiring Senate approval. 137 S. Ct. at 935. Although the Court's opinion did not address the Appointments Clause, Justice Thomas's concurring opinion suggested that a presidential directive to serve as an officer under the Vacancies Reform Act should be viewed as an appointment, and that such a direction would "raise[] grave constitutional concerns because the Appointments Clause forbids the President to appoint principal officers without the advice and consent of the Senate." *Id.* But Justice Thomas also distinguished *Eaton* on the ground that the acting designation at issue in *SW General* was not "special and temporary" because it had remained in place "for more than three years in offices limited by statute to a 4-year term." *Id.* at 946 n.1. Justice Thomas's opinion may therefore be understood to be consistent not only with *Eaton*, but also with the precedents of this Office, which have found it "implicit" that "the tenure of an Acting Director should not continue beyond a reasonable time." *Status of the Acting Director, Office of Management and Budget*, 1 Op. O.L.C. 287, 289–90 (1977). Even under Justice Thomas's opinion, Mr. Whitaker's designation as Acting Attorney General, which was made one week ago, and which would lapse in the absence of a presidential nomination, should qualify as "special and temporary" under *Eaton*.

C.

Executive practice and more recent legislation reinforces that an inferior officer may temporarily act in the place of a principal officer. In 1980, for instance, this Office raised no constitutional concerns in concluding (in the context of a non-executive office) that the Comptroller General was statutorily authorized to "designate an employee" of the General Accounting Office to be Acting Comptroller General during the absence or incapacity of both the Senate-confirmed Comptroller General and the Senate-confirmed Deputy Comptroller General. *Authority of the Comptroller General to Appoint an Acting Comptroller General*, 4B Op. O.L.C. 690, 690–91 (1980).

Most significantly, in 2003, this Office relied on *Eaton* in concluding that, although "the position of Director [of OMB] is a principal office, . . . an Acting Director [of OMB] is only an inferior officer." *Acting Director of OMB*, 27 Op. O.L.C. at 123. We did not think that that conclusion had been called into question by *Edmond*'s statement that an inferior officer is one who reports to a superior officer below the President, because in that case "[t]he Court held only that '[g]enerally speaking' an inferior officer is subordinate to an officer other than the President," and because *Edmond* did not deal with temporary officers. 27 Op. O.L.C. at 124 (citations omitted). Assuming that for constitutional purposes the official designated as acting head of an agency would need to be an inferior officer (and that the OMB official in question was not already such an officer), we further concluded that the President's designation of an acting officer under the Act should be regarded as an appointment by the President alone—a constitutionally permissible mode for appointing an inferior officer. *Id.* at 125. Since then, Presidents George W. Bush and Obama each used their authority under the Vacancies Reform Act to place non-Senate-confirmed Chiefs of Staff in the lines of succession to be the acting head of several federal agencies.[13] In three instances, President Obama placed a Chief of Staff above at least one Senate-confirmed officer within the same department.[14] And, in practice, during the Bush, Obama, and Trump Administrations, multiple unconfirmed officers were designated to serve as acting agency heads, either under the Vacancies Reform Act or another office-specific

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[13] See Memorandum, Designation of Officers of the Social Security Administration, 71 Fed. Reg. 20333 (Apr. 17, 2006); Memorandum, Designation of Officers of the Council on Environmental Quality, 73 Fed. Reg. 54487 (Sept. 18, 2008) (later superseded by 2017 memorandum cited below); Memorandum, Designation of Officers of the Overseas Private Investment Corporation to Act as President of the Overseas Private Investment Corporation, 76 Fed. Reg. 33613 (June 6, 2011); Memorandum, Designation of Officers of the Millennium Challenge Corporation to Act as Chief Executive Officer of the Millennium Challenge Corporation, 77 Fed. Reg. 31161 (May 21, 2012); Memorandum, Designation of Officers of the General Services Administration to Act as Administrator of General Services, 78 Fed. Reg. 59161 (Sept. 20, 2013); Memorandum, Designation of Officers of the Office of Personnel Management to Act as Director of the Office of Personnel Management, 81 Fed. Reg. 54715 (Aug. 12, 2016); Memorandum, Providing an Order of Succession Within the National Endowment of the Humanities, 81 Fed. Reg. 54717 (Aug. 12, 2016); Memorandum, Providing an Order of Succession Within the National Endowment of the Arts, 81 Fed. Reg. 96335 (Dec. 23, 2016); Memorandum, Designation of Officers or Employees of the Office of Science and Technology Policy to Act as Director, 82 Fed. Reg. 7625 (Jan. 13, 2017); Memorandum, Providing an Order of Succession Within the Council on Environmental Quality, 82 Fed. Reg. 7627 (Jan. 13, 2017).

[14] See Executive Order 13612, Providing an Order of Succession Within the Department of Agriculture, 77 Fed. Reg. 31153 (May 21, 2012); Executive Order 13735, Providing an Order Within the Department of the Treasury, 81 Fed. Reg. 54709 (Aug. 12, 2016); Executive Order 13736, Providing an Order of Succession Within the Department of Veterans Affairs, 81 Fed. Reg. 54711 (Aug. 12, 2016).

statute.[15] Those determinations reflect the judgments of these administrations that the President may lawfully designate an unconfirmed official, including a Chief of Staff, to serve as an acting principal officer.

Congress too has determined in the Vacancies Reform Act and many other currently operative statutes that non-Senate-confirmed officials may temporarily perform the functions of principal officers. By its terms, the Vacancies Reform Act applies to nearly all executive offices for which appointment "is required to be made by the President, by and with the advice and consent of the Senate." 5 U.S.C. § 3345(a); *see id.* § 3349c(1)–(3) (excluding only certain members of multi-member boards, commissions, or similar entities). And it specifically provides for different treatment in some respects depending on whether the vacant office is that of an agency head. *Id.* § 3348(b)(2). Moreover, the statute contemplates that non-Senate-confirmed officials will be able to serve as acting officers in certain applications of section 3345(a)(1) as well as in all applications of section 3345(a)(3), which refers to an "officer or employee." The latter provision had no counterpart in the Vacancies Act of 1868, but it was not completely novel, because clerks, who were not Senate-confirmed, were routinely authorized to serve as acting officers under the 1792 and 1795 statutes.[16]

Congress has also enacted various statutes that enable deputies not confirmed by the Senate to act when the office of the Senate-confirmed agency head is vacant. *See* 12 U.S.C. § 4512(f) (providing for an Acting Director of the Federal Housing Finance Agency); *id.* § 5491(b)(5) (providing for an Acting Director of the Bureau of Consumer Financial Protection); 21 U.S.C. § 1703(a)(3) (providing for an Acting Director of the Office of National Drug Control Policy); 40 U.S.C. § 302(b) (providing for an Acting Administrator of the General Services Administration); 44 U.S.C. § 2103(c) (providing for an Acting Archivist). All of those provisions contemplate the temporary service of non-Senate-confirmed officials as acting

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[15] For example, during this administration, Grace Bochenek, a non-Senate-confirmed laboratory director, served as Acting Secretary of Energy from January 20, 2017, until March 2, 2017; Tim Horne, a non-Senate-confirmed Regional Commissioner, served as Acting Administrator of the General Services Administration from January 20, 2017, until December 12, 2017 (pursuant to a designation under a GSA-specific statute); Phil Rosenfelt, a non-Senate-confirmed Deputy General Counsel, served as Acting Secretary of Education from January 20, 2017, until February 7, 2017 (pursuant to a designation under a statute specific to that department); Don Wright, a non-Senate-confirmed Deputy Assistant Secretary, served as Acting Secretary of Health and Human Services from September 30, 2017, until October 10, 2017; Peter O'Rourke, a non-Senate-confirmed Chief of Staff, served as Acting Secretary of Veterans Affairs from May 29, 2018, until July 30, 2018; and Shelia Crowley, a non-Senate-confirmed Chief of Operations, served, upon President's Obama's designation, as Acting Director of the Peace Corps from January 20, 2017, until November 16, 2017. During the Obama administration, Darryl Hairston, a career employee, served as Acting Administrator of the Small Business Administration from January 22, 2009, until April 6, 2009, and Edward Hugler, a non-Senate-confirmed Deputy Assistant Secretary, served as Acting Secretary of Labor from February 2, 2009, until February 24, 2009. During the Bush Administration, Augustine Smythe, a non-Senate-confirmed Executive Associate Director served as Acting Director of OMB from June 10, 2003, until late June 2003, consistent with our opinion.

[16] Echoing the movement in the early nineteenth century to chief clerks rather than Senate-confirmed officials from other departments, section 3345(a)(3) was reportedly the product of a desire to give the President "more flexibility" to use "qualified individuals who have worked within the agency in which the vacancy occurs for a minimum number of days and who are of a minimum grade level." S. Rep. No. 105-250, at 31 (additional views of Sen. Glenn et al.); *id.* at 35 (minority views of Sens. Durbin and Akaka).

principal officers, and these statutes would appear to be unconstitutional if only a Senate-confirmed officer could temporarily serve as an acting principal officer.

Similarly, other current statutes provide that, although the deputy is appointed by the President with the Senate's advice and consent, the President or the department head may designate another official to act as the agency head, even though that official is not Senate-confirmed. *See* 20 U.S.C. § 3412(a)(1) (providing that "[t]he Secretary [of Education] shall designate the order in which other officials of the Department shall act for and perform the functions of the Secretary . . . in the event of vacancies in both" the Secretary and Deputy Secretary positions); 31 U.S.C. § 502(f) (providing that the President may designate "an officer of the Office [of Management and Budget] to act as Director"); 38 U.S.C. § 304 (providing that the Deputy Secretary of Veterans Affairs serves as Acting Secretary "[u]nless the President designates another officer of the Government"); 42 U.S.C. § 7132(a) (providing that "[t]he Secretary [of Energy] shall designate the order in which the Under Secretary and other officials shall act for and perform the functions of the Secretary . . . in the event of vacancies in both" the Secretary and Deputy Secretary positions); 49 U.S.C. § 102(e) (providing that the Secretary of Transportation shall establish an order of succession that includes Assistant Secretaries who are not Senate-confirmed for instances in which the offices of the Secretary, Deputy Secretary, and Under Secretary of Transportation for Policy are vacant); 40 U.S.C. § 302(b) (providing that the Deputy Administrator serves as Acting Administrator of General Services when that office "is vacant," "unless the President designates another officer of the Federal Government"); *cf.* 44 U.S.C. § 304 (limiting the individuals whom the President may choose to serve as Acting Director of the Government Printing Office to those who occupy offices requiring presidential appointment with the Senate's advice and consent).

Indeed, if it were unconstitutional for an official without Senate confirmation to serve temporarily as an acting agency head, then the recent controversy over the Acting Director of the CFPB should have been resolved on that ground alone—even though it was never raised by any party, the district court, or the judges at the appellate argument. On November 24, 2017, the Director of the CFPB appointed a new Deputy Director, expecting that she would become the Acting Director upon his resignation later that day. *Acting Director of CFPB*, 41 Op. O.L.C. __, at *2 n.1. The Director of the CFPB relied on 12 U.S.C. § 5491(b)(5), which expressly contemplates that a non-Senate-confirmed official (the Deputy Director) will act as a principal officer (the Director). The President, however, exercised his authority under 5 U.S.C. § 3345(a)(2) to designate the Director of OMB as Acting Director of the CFPB. *See English*, 279 F. Supp. 3d at 330. When the Deputy Director challenged the President's action, we are not aware that anyone ever contended that the Deputy Director was constitutionally ineligible to serve as Acting Director because she had not been confirmed by the Senate. If the newly installed Deputy Director of the CFPB could lawfully have become the Acting Director, then the Chief of Staff to the Attorney General may serve as Acting Attorney General in the case of a vacancy.

D.

The constitutionality of Mr. Whitaker's designation as Acting Attorney General is supported by Supreme Court precedent, by acts of Congress passed in three different centuries, and by countless examples of executive practice. To say that the Appointments Clause now

prohibits the President from designating Mr. Whitaker as Acting Attorney General would mean that the Vacancies Reform Act and a dozen statutes were unconstitutional, as were countless prior instances of temporary service going back to at least the Jefferson Administration.

There is no question that Senate confirmation is an important constitutional check on the President's appointments of senior officers. The Senate's role "serves both to curb Executive abuses of the appointment power, and to promote a judicious choice of [persons] for filling the offices of the union." *Edmond*, 520 U.S. at 659 (internal quotation marks omitted). At the same time, the "constitutional process of Presidential appointment and Senate confirmation . . . can take time: The President may not promptly settle on a nominee to fill an office; the Senate may be unable, or unwilling, to speedily confirm the nominee once submitted." *SW General*, 137 S. Ct. at 935. Despite their frequent disagreements over nominees, for over 200 years, Congress and the President have agreed upon the value and permissibility of using temporary appointments, pursuant to limits set by Congress, in order to overcome the delays of the confirmation process.

If the President could not rely on temporary designations for principal offices, then the efficient functioning of the Executive Branch would be severely compromised. Because most Senate-confirmed officials resign at the end of an administration, a new President must rely on acting officials to serve until nominees have been confirmed. If Senate confirmation were required before anyone could serve, then the Senate could frustrate the appropriate functioning of the Executive Branch by blocking the confirmation of principal officers for some time. *See* 144 Cong. Rec. 27496 (Oct. 21, 1998) (statement of Sen. Thompson) (noting that section 3345(a)(3) had been added because "[c]oncerns had been raised that, particularly early in a presidential administration, there will sometimes be vacancies in first assistant positions, and that there will not be a large number of Senate-confirmed officers in the government," as well as "concerns . . . about designating too many Senate-confirmed persons from other offices to serve as acting officers in additional positions"). A political dispute with the Senate could frustrate the President's ability to execute the laws by delaying the appointment of his principal officers.

The problems with a contrary rule are not limited to the beginning of an administration. Many agencies would run into problems on an ongoing basis, because they have few officers subject to Senate confirmation. Thus, when a vacancy in the top spot arises, such an agency would either lack a head or be forced to rely upon reinforcements from Senate-confirmed appointees outside the agency. Those outside officers may be inefficient choices when a non-Senate-confirmed officer within the agency is more qualified to act as a temporary caretaker. At best, designating a Senate-confirmed officer to perform temporary services would solve a problem at one agency only by cannibalizing the senior personnel of another.

It is true that these concerns do not apply to the current circumstances of the Department of Justice, which is staffed by a number of Senate-confirmed officers. Following Attorney General Sessions's resignation, the President could have relied upon the Deputy Attorney General, the Solicitor General, or an Assistant Attorney General to serve as Acting Attorney General. But the availability of potential alternatives does not disable Congress from providing the President with discretion to designate other persons under section 3345(a)(3) of the Vacancies Reform Act. Nothing in the text of the Constitution or historical practice suggests that

the President may turn to an official who has not been confirmed by the Senate if, but only if, there is no appropriate Senate-confirmed official available.

III.

The President's designation to serve as Acting Attorney General of a senior Department of Justice official who does not currently hold a Senate-confirmed office is expressly authorized by 5 U.S.C. § 3345(a)(3). Mr. Whitaker has been designated based upon a statute that permits him to serve as Acting Attorney General for a limited period, pending the Senate's consideration of a nominee for Attorney General. Consistent with our 2003 opinion, with *Eaton*, and with two centuries of practice, we advised that his designation would be lawful.

STEVEN A. ENGEL
Assistant Attorney General

EXHIBIT B

IN THE SUPREME COURT OF THE UNITED STATES

No. 18-496

BARRY MICHAELS, PETITIONER

v.

MATTHEW G. WHITAKER, ACTING ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENTS IN OPPOSITION TO PETITIONER'S MOTION TO SUBSTITUTE

The Solicitor General, on behalf of Matthew G. Whitaker, Acting Attorney General, and Thomas E. Brandon, Deputy Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), respectfully submits this memorandum in opposition to petitioner's motion to substitute.

STATEMENT

1. In 2016, petitioner brought this putative class action against then-Attorney General Loretta E. Lynch, "in her representative capacity as Attorney General," and ATF Deputy Director Brandon. Compl. ¶¶ 2-3. The gravamen of petitioner's

complaint was that the federal prohibition on firearm possession by convicted felons, 18 U.S.C. 922(g)(1), is unconstitutional as applied to certain individuals convicted of non-violent felonies. Pet. App. 10a-13a. The district court dismissed the complaint and denied leave to amend, after finding petitioner's claims foreclosed by circuit precedent. Id. at 15a-17a.

On November 3, 2017, the court of appeals affirmed in an unpublished decision. Pet. App. 5a-7a. The court adhered to its prior determination that "felons are categorically different from the individuals who have a fundamental right to bear arms." Id. at 6a (quoting United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir.), cert. denied, 562 U.S. 921 (2010)). The court also noted that Attorney General Lynch had been succeeded in office by Attorney General Jefferson B. Sessions III and that the latter had therefore been "substituted for his predecessor" as a party to the appeal under Federal Rule of Appellate Procedure 43(c)(2). Pet. App. 5a n.*. On March 29, 2018, the court denied a petition for rehearing and rehearing en banc. Id. at 1a-2a.

On June 27, 2018, petitioner filed a petition for a writ of certiorari. According to petitioner, the question presented concerns the circumstances in which "an as-applied challenge to the constitutionality of a felon disarmament law" may be brought. Pet. i. Petitioner named then-Attorney General Sessions and ATF Deputy Director Brandon as respondents. Pet. ii.

2. On November 7, 2018, Attorney General Sessions resigned from office, and the President designated Matthew G. Whitaker, Chief of Staff and Senior Counselor to the Attorney General, to act temporarily as the Attorney General under the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. 3345 et seq. See Designating an Acting Attorney General, 42 Op. O.L.C. __, at 1 (Nov. 14, 2018), slip op. (OLC Memorandum), https://www.justice.gov/olc/file/1112251/download.

3. On November 16, 2018, petitioner moved to substitute Rod J. Rosenstein, the Deputy Attorney General, as a party to the proceedings in this Court in lieu of Acting Attorney General Whitaker. Mot. to Substitute (Mot.) 1. Petitioner claims that Deputy Attorney General Rosenstein is the Acting Attorney General by operation of 28 U.S.C. 508(a) and that Mr. Whitaker's appointment is unlawful on statutory and constitutional grounds. Ibid.

ARGUMENT

Matthew G. Whitaker is the Acting Attorney General of the United States. Under Rule 35.3 of the Rules of this Court, "[w]hen a public officer who is party to a proceeding in this Court in an official capacity * * * resigns," the official's "successor in office is automatically substituted." By operation of that rule, Acting Attorney General Whitaker was automatically substituted as a party to this official-capacity suit when the President

designated him to serve as Acting Attorney General on November 7, 2018, after Attorney General Sessions resigned.

Petitioner asks this Court to reject that straightforward operation of Rule 35.3 and instead adjudicate the lawfulness of Mr. Whitaker's appointment as Acting Attorney General. Mot. 1. That procedural gambit should be rejected. As petitioner concedes (Mot. 3), no court -- in this case or any other -- has previously addressed the questions petitioner seeks to inject here. Moreover, those questions have no bearing on the resolution of this official-capacity suit, and petitioner lacks standing to raise them. The Court therefore should decline petitioner's request to address those matters in the first instance in this suit. In any event, the President's designation of the Acting Attorney General was proper under both the FVRA and the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2.

1. Rule 35.3 provides that "[w]hen a public officer who is a party to a proceeding in this Court in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate and any successor in office is automatically substituted as a party." Sup. Ct. R. 35.3; cf. Fed. R. Civ. P. 25(d) ("The officer's successor is automatically substituted as a party."); Fed. R. App. P. 43(c)(2) (similar). The rule reflects that official-capacity suits seek relief from a particular government official "only nominally." Lewis v. Clarke, 137 S. Ct. 1285, 1292

(2017). The "real party in interest is the government entity, not the named official." Ibid. (citing Edelman v. Jordan, 415 U.S. 651, 663-665 (1974)); see, e.g., Kentucky v. Graham, 473 U.S. 159, 165 (1985) ("Official-capacity suits * * * 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'") (citation omitted). Because the real party in interest is the sovereign, the automatic substitution of a successor in office after a public official resigns is "merely a procedural device" and "does not affect any substantive issues which may be involved in the action." Fed. R. Civ. P. 25 advisory committee's note (1961 Amendment).

Petitioner brought this suit against then-Attorney General Lynch "in her representative capacity as Attorney General of The United States of America." Compl. ¶ 2; see Pet. App. 10a-11a. He seeks pre-enforcement declaratory and injunctive relief from the operation of a federal statute, 18 U.S.C. 922(g)(1). See Compl. ¶¶ 35-40. He does not assert any personal-capacity claims against former Attorney General Lynch or any other governmental official, nor does he assert that the Attorney General had any personal role in any matter relating in any way to his claims. The "real party in interest," Lewis, 137 S. Ct. at 1291, is thus the Department of Justice or the United States itself, not the individual personally performing the duties of the Attorney General at a particular time.

Acting Attorney General Whitaker therefore was properly "automatically substituted as a party" to this official-capacity suit when former Attorney General Sessions resigned, Sup. Ct. R. 35.3, just as Attorney General Sessions was substituted as a party for Attorney General Lynch during the pendency of petitioner's appeal, Pet. App. 5a n.*. At all times, the suit has run against a particular Attorney General in name only. Indeed, the Rules of this Court would permit naming the respondent as simply "the Attorney General." See Sup. Ct. R. 35.4.

2. Petitioner seeks (Mot. 1-3) to substitute the Deputy Attorney General as a party to the proceedings in this Court on the theory that the President's appointment of Mr. Whitaker as Acting Attorney General was unlawful. But petitioner identifies no basis or reason for the Court to address that matter now, in this anomalous posture.

a. Petitioner suggests (Mot. 1) that Rule 35.3 requires the Court to have "the ability * * * to identify the correct successor" and that it cannot do so where petitioner disputes the lawfulness of Mr. Whitaker's appointment. But that suggestion reflects petitioner's misunderstanding of Rule 35.3.

As explained above, Rule 35.3 and its analogues in the lower federal courts are premised on the nature of official-capacity suits, in which the real party in interest is a "governmental entity and not the named official." Hafer v. Melo, 502 U.S. 21,

25 (1991). As a result, when a successor "is automatically substituted as a party" under Rule 35.3, it is of no consequence to the opposing party whether the successor is properly identified. Any error in identifying the Acting Attorney General would not deprive the Department of Justice of notice of the litigation. Cf. Graham, 473 U.S. at 166 ("As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."). Nor would any error relieve the government from being bound by the judgment, or otherwise affect the scope or operation of any relief. Indeed, "any misnomer [in the substitution] not affecting substantial rights of the parties will be disregarded." Sup. Ct. R. 35.3; see Charles A. Wright, Substitution of Public Officers: The 1961 Amendment to Rule 25(d), 27 F.R.D. 221, 242 (1961) (noting that, in official-capacity suits, "[t]he manipulation of names is merely a technicality which should not interfere with substantial rights"). As already noted, the Rules of this Court do not even require identifying a public official by name rather than title in an official-capacity suit. Sup. Ct. R. 35.4. Accordingly, the automatic-substitution rule presents no occasion for this Court to address the validity of a successor official's appointment to office, either in this case or in any of the countless other official-capacity cases, federal and state, that come before this Court.

b. The lawfulness of Mr. Whitaker's appointment also has no bearing on the proper disposition of the certiorari petition. Petitioner seeks review of what he frames as two questions concerning the scope of an as-applied constitutional challenge to 18 U.S.C. 922(g)(1). Pet. i. The Acting Attorney General's appointment is immaterial to whether those questions merit review and, if so, how to resolve them. Petitioner does not contend otherwise. To the contrary, petitioner implicitly concedes that the Court would need to address the appointment question only in a case, unlike this one, where the Acting Attorney General personally took action that aggrieved the party contesting the designation. See Mot. 2 (suggesting that the validity of the Acting Attorney General's designation would properly be addressed in a case involving his "personal responsibilities" and "personal orders").

Petitioner likewise does not suggest that the authority of the Solicitor General to act for the United States in this proceeding depends in any way on petitioner's challenge to the validity of the Acting Attorney General's designation. Although most functions of the Department of Justice, including its litigation functions, are vested in the first instance in the Attorney General, see 28 U.S.C. 509, the Attorney General need not and in most cases does not exercise those functions personally. The authority to conduct litigation "in which the United States,

an agency, or officer thereof is a party," 28 U.S.C. 516, has been conferred by statute and regulation on other officers of the Department. In particular, the Solicitor General is authorized by statute and regulation to conduct litigation in this Court, without any need for authorization or personal participation by the Attorney General. See 28 U.S.C. 518(a) (authorizing the Solicitor General to "conduct and argue suits and appeals in the Supreme Court"); 28 C.F.R. 0.20(a) (assigning to the Solicitor General responsibility for "[c]onducting * * * all Supreme Court cases"). Other officers of the Department have similar authority for the conduct of litigation in the lower courts. See, e.g., 28 U.S.C. 547(1) and (2) (authorizing United States Attorneys to "prosecute for all offenses against the United States" and to "prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned"); 28 C.F.R. 0.13(a) (authorizing "[e]ach Assistant Attorney General and Deputy Assistant Attorney General * * * to exercise the authority of the Attorney General under 28 U.S.C. 515(a), in cases assigned to, conducted, handled, or supervised by such official").

c. For similar reasons, petitioner lacks standing to challenge the lawfulness of Mr. Whitaker's designation as Acting Attorney General. The appointment did not cause petitioner's asserted injury -- being barred by federal law, as a convicted felon, from purchasing a firearm -- and resolving the lawfulness

of the designation would not redress that putative injury in any fashion. Petitioner instead seeks to raise "a generally available grievance about government," and such grievances do "not state an Article III case or controversy." Hollingsworth v. Perry, 570 U.S. 693, 706 (2013) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-574 (1992)); see, e.g., Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) (noting that Article III requires a plaintiff to demonstrate a "particularized" injury, meaning one that "affect[s] the plaintiff in a personal and individual way") (citation omitted). Article III forecloses considering petitioner's generalized complaint about Mr. Whitaker's designation, and petitioner cannot evade that requirement by invoking Rule 35.3.*

d. Finally, petitioner's motion is contrary to this Court's repeated admonition that the Court sits as "a court of review, not of first view." Byrd v. United States, 138 S. Ct. 1518, 1527 (2018) (quoting Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005)). The Court's general practice is "not [to] decide in the first instance issues not decided below" in the course of the litigation. Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012) (quoting NCAA v. Smith, 525 U.S. 459, 470 (1999)). A fortiori,

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* Indeed, unlike a criminal defendant or an alien in removal proceedings (Mot. 1-2), petitioner is currently not even subject to any form of enforcement action brought or adjudicated by the Department of Justice, let alone one involving personal participation by the Acting Attorney General.

the Court typically does not address questions that have not been addressed in any case by the lower courts. See, e.g., Chaidez v. United States, 568 U.S. 342, 358 n.16 (2013) (declining to address an argument the petitioner raised in her brief on the merits where no "federal court has considered [the] contention").

By petitioner's own admission (Mot. 3), no other court has considered the statutory and constitutional questions petitioner asks the Court to resolve in the present motion. Litigants are, however, raising similar arguments in a number of criminal and civil cases pending in district courts around the country. See, e.g., Compl. ¶¶ 35-43, Blumenthal v. Whitaker, No. 18-cv-2664 (D.D.C. Nov. 19, 2018); Pl.'s Mot. for Prelim. Inj. at 1-2, Maryland v. United States, No. 18-cv-2849 (D. Md. Nov. 13, 2018); Def.'s Mot. to Dismiss Indictment at 4-6, United States v. Haning, No. 18-cr-139 (E.D. Mo. Nov. 13, 2018). None of those courts has decided any of these issues.

Petitioner argues (Mot. 3) for pretermitting the ordinary course of those proceedings and addressing the lawfulness of Mr. Whitaker's appointment now, before any other court has done so, because the issue is "a pure question of law" and because the Department of Justice has released a legal memorandum from the Office of Legal Counsel explaining why the appointment is lawful. But the Court's practice of declining to address issues in the first instance has never turned on such factors. Even if the

Department's position is well known, entertaining the questions petitioner seeks to interpose here would require this Court to decide in the first instance the issues petitioner seeks to inject into the case.

Petitioner also argues (Mot. 2-3) that practical considerations weigh in favor of addressing the lawfulness of Mr. Whitaker's appointment, but the opposite is true. The question may never need to be addressed. As explained at pp. 8-9, supra, by statute and preexisting regulation, the Department's litigation is conducted and supervised by officers whose litigation authority does not depend on the validity of Mr. Whitaker's designation as Acting Attorney General. See, e.g., 28 U.S.C. 518(a); 28 C.F.R. 0.20(a). The question could also become moot if the Acting Attorney General is succeeded by another official before these cases are resolved. If in the future a particular person claims to be adversely affected by an action personally taken by Mr. Whitaker while serving as Acting Attorney General, that person could seek to raise issues concerning his designation.

4. In all events, the President's temporary designation of Mr. Whitaker as the Acting Attorney General is valid as both a statutory and constitutional matter.

a. Under the FVRA, when a presidentially appointed, Senate-confirmed officer "dies, resigns, or is otherwise unable to perform the functions and duties of the office," the "first assistant" to

that office by default "shall perform the functions and duties of the office temporarily in an acting capacity." 5 U.S.C. 3345(a)(1). But the FVRA also authorizes the President to override that default rule. As relevant here, "the President (and only the President) may direct an officer or employee" of the agency in which the vacancy occurs "to perform the functions and duties of the vacant office temporarily in an acting capacity," as long as the officer or employee served in the agency for at least 90 of the 365 days preceding the vacancy and is paid at least at the GS-15 level. 5 U.S.C. 3345(a)(3). An individual whom the President designates under that provision may serve in an acting capacity subject to the time limitations of 5 U.S.C. 3346.

The President invoked 5 U.S.C. 3345(a)(3) to designate Mr. Whitaker as the Acting Attorney General following former Attorney General Sessions' resignation from office. See OLC Memorandum 1. At the time, Mr. Whitaker had been serving in the Department of Justice as Chief of Staff and Senior Counselor to the Attorney General, and he met the statutory requirements of having served in the Department of Justice for at least 90 days prior to the vacancy at a rate of pay of GS-15 or higher. See id. at 5. Petitioner does not contend otherwise. Accordingly, Mr. Whitaker's appointment as Acting Attorney General satisfied the plain terms of Section 3345(a)(3).

Petitioner's statutory argument that the President could not designate Mr. Whitaker to serve as Acting Attorney General (Mot. 8-17) rests entirely on the premise that the President generally may not invoke the FVRA at all with respect to a vacancy in the office of the Attorney General, because a separate statute, 28 U.S.C. 508, is supposedly the exclusive means for addressing such a vacancy. That premise is wrong, for reasons the Department's Office of Legal Counsel has explained at length. See OLC Memorandum 5-8; see also Authority of the President to Name an Acting Attorney General, 31 Op. O.L.C. 208, 209-210 (2007). In brief, 28 U.S.C. 508(a) states that "[i]n case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office." Section 508(a) also specifies that "for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General." Ibid. On its face, Section 508(a) does not purport to be the exclusive means of addressing a vacancy in the office of the Attorney General, and indeed the reference to the first section of the FVRA ("section 3345 of title 5," ibid.) in Section 508(a) itself confirms the opposite.

Petitioner incorrectly argues (Mot. 7, 9-10) that a separate provision in the FVRA makes 28 U.S.C. 508 exclusive. The relevant provision, entitled "Exclusivity," states that "Sections 3345 and 3346" of the FVRA "are the exclusive means for temporarily

authorizing an acting official to perform the functions and duties of any [presidentially appointed, Senate-confirmed] office of an Executive agency," unless another statute "expressly * * * designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." 5 U.S.C. 3347(a)(1)(B). Petitioner is correct that Section 508(a) is a statute that "designates an officer or employee to perform the functions and duties of a specified office" within the meaning of that provision. Mot. 9 (citation omitted); see 31 Op. O.L.C. at 208. But by the plain terms of the FVRA, the existence of such an agency-specific succession statute means only that the FVRA is not "exclusive"; it does not mean that the FVRA is therefore unavailable or inapplicable. 5 U.S.C. 3347(a) (emphasis added). When an agency-specific statute, such as Section 508(a), provides a default rule for succession in office, 5 U.S.C. 3347 ensures that the President may either allow that default rule to operate or may invoke the FVRA to designate an alternate acting officer. Petitioner's contrary reading would invert the meaning of the FVRA's exclusivity provision, transforming it from a rule about when the FVRA is exclusive of other statutes into one about when other statutes are exclusive of the FVRA.

The structure of the FVRA confirms that 5 U.S.C. 3347 does not render the FVRA inapplicable in the face of an agency-specific vacancy statute, including 28 U.S.C. 508. Congress addressed the

inapplicability of the FVRA elsewhere in the statute. Section 3345 applies in general to vacancies in an "Executive agency." 5 U.S.C. 3345(a); see 5 U.S.C. 105 (defining "'Executive agency'" to include any "Executive department," such as the Department of Justice). In a separate provision, entitled "Exclusion of certain officers," Congress qualified the scope of the FVRA by providing that "Section[] 3345 * * * shall not apply" to certain specified officers in certain specified agencies. 5 U.S.C. 3349c. If Congress had intended agency-specific vacancy statutes to render the FVRA inapplicable rather than non-exclusive, it would have addressed them in Section 3349c rather than Section 3347(a)(1)(B). And the Attorney General, in particular, is not among the officers excluded from coverage under the FVRA by Section 3349c. See ibid.

By contrast, the vacancy statute that preceded the FVRA contained a provision authorizing the President to designate a presidentially appointed, Senate-confirmed officer to perform the duties of a vacant office in some circumstances, but that provision expressly did "not apply to a vacancy in the office of Attorney General." 5 U.S.C. 3347 (1994). Petitioner notes that similar provisions can be traced to the 1870s. Mot. 7, 20; see, e.g., Rev. Stat. § 179 (2d ed. 1878). But petitioner draws (Mot. 19 n.3) precisely the wrong inference from that history. In the FVRA, Congress omitted -- and therefore eliminated -- the prior limitation. See OLC Memorandum 7; see also, e.g., Murphy v. Smith,

138 S. Ct. 784, 789 (2018) (giving effect to Congress's purposeful omission of prior statutory language); Brewster v. Gage, 280 U.S. 327, 337 (1930) (noting that "[t]he deliberate selection of language so differing from that used in the earlier Acts indicates that a change of law was intended").

In light of the FVRA's text and structure, it is unsurprising that the only court of appeals to address the question has concluded that agency-specific vacancy statutes do not displace the President's FVRA authority. In Hooks v. Kitsap Tenant Support Services, Inc., 816 F.3d 550 (9th Cir. 2016), the court of appeals rejected the argument that the FVRA was inapplicable where an agency-specific statute "expressly provide[d] a means for filling" the vacancy in question. Id. at 556 (discussing 29 U.S.C. 153(d)). The court concluded that "the text of the respective statutes" "belied" any such argument. Id. at 555. The existence of an agency-specific statute, the court explained, means only that "neither the FVRA nor the [agency-specific statute] is the exclusive means of appointing" an acting officer, and "the President is permitted to elect between these two statutory alternatives." Id. at 556; see English v. Trump, 279 F. Supp. 3d 307, 323-324 (D.D.C. 2018) (reaching a similar conclusion with respect to the office of the Director of the Bureau of Consumer Financial Protection).

That conclusion is confirmed by the legislative history of the FVRA. The Senate Committee Report accompanying the bill that was the basis for the FVRA contained a list of then-existing, agency-specific statutes "that expressly authorize the President * * * to designate an officer to perform the functions and duties of a specified officer temporarily in an acting capacity, as well as statutes that expressly provide for the temporary performance of the functions and duties of an office by a particular officer or employee." S. Rep. No. 250, 105th Cong., 2d Sess. 15 (1998) (Senate Report). The Report stated that the bill would "retain[]" those statutes, ibid., but that in those instances the "Vacancies Act would continue to provide an alternative procedure for temporarily occupying the office," id. at 17 (emphasis added).

Petitioner asserts (Mot. 19) that this explanation in the Senate Report pertained to a different provision in the bill, which Congress did not enact, stating that the FVRA would be applicable unless "another statutory provision expressly provides that the such [sic] provision supersedes sections 3345 and 3346." Senate Report 26 (proposed 5 U.S.C. 3347(a)(1)). But that provision would have covered only statutes that "expressly" supersede Sections 3345 and 3346, and none of the preexisting statutes listed in the Senate Report did so. Instead, the Senate Report's statement that the preexisting statutes would be retained was plainly relying on the provision in the proposed bill addressing agency-specific

statutes that expressly authorize the President to designate an officer to perform the functions and duties of the vacant office, and those that expressly provide for the performance of those duties by a particular officer. See ibid. (proposed 5 U.S.C. 3347(a)(2)(A) and (B)). That provision parallels the exact language ultimately enacted as subparagraphs (A) and (B) of 5 U.S.C. 3347(a)(1). The Senate Report thus confirms that the FVRA and the listed statutes would be available as alternative mechanisms for addressing a vacancy in a covered office.

The drafting history further confirms that the FVRA is available as an alternative means of addressing a vacancy in the office of the Attorney General. A provision in the bill as reported in the Senate would have provided that "[w]ith respect to the office of the Attorney General * * * the provisions of section 508 of title 28 shall be applicable," Senate Report 25, which would have limited the President's authority to designate a person to perform the functions and duties of the Attorney General via the FVRA, see id. at 13. But Congress omitted that limitation from the final version of the Act. The deletion of that limitation means that the office of Attorney General is within the category of offices referred to in 5 U.S.C. 3347(a)(1)(A) and (B) for which the FVRA is an alternative to the agency-specific statute. And indeed 28 U.S.C. 508 was included in the list of such then-existing agency-specific statutes in the Senate Report. See id. at 16.

"Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language." INS v. Cardoza-Fonseca, 480 U.S. 421, 442-443 (1987) (citation omitted); cf. pp. 16-17, supra.

The other canons of construction that petitioner invokes are inapposite. The FVRA and 28 U.S.C. 508(a) do not conflict, but rather are textually harmonious and operate as two alternatives, just as is true of the FVRA and other agency-specific statutes. The canon of relative specificity (Mot. 13-15) therefore has no bearing here. The observation that Congress can speak clearly when it wishes (Mot. 14-15) does nothing to further petitioner's argument. Congress has spoken clearly in the text of the FVRA, as explained above, and the statutory history demonstrates that Congress well knew how to make the FVRA inapplicable to the office of the Attorney General but declined to do so. See pp. 16-19, supra. Giving effect to both statutes, according to their plain language, does not work an implied repeal of either one. Mot. 15-17. Petitioner asserts that reading the FVRA as an alternative to 28 U.S.C. 508 and other agency-specific statutes would lead to a "breathtaking" result (Mot. 17-18) that Congress did not anticipate. The plain text of 5 U.S.C. 3345(a)(3), however, demonstrates that Congress intended to authorize the President to designate any "officer or employee" of an agency to perform the

functions and duties of a vacant office temporarily, if the officer or employee satisfies the 90-day tenure and GS-15 salary requirements of the statute. And the FVRA elsewhere confirms that Congress intended the Act to apply to vacancies in the office of the head of an executive agency. See 5 U.S.C. 3348(b)(2) (special rule applicable only "in the case of an office other than the office of the head of an Executive agency"). Finally, the avoidance canon (Mot. 21) is inapplicable. For the reasons set forth above, the FVRA's exclusivity provision is clear and unambiguous; moreover, as next explained, reading the FVRA to permit the President to designate an individual such as Mr. Whitaker to act temporarily as Attorney General does not raise any substantial constitutional concerns.

b. Mr. Whitaker's designation to serve temporarily as Acting Attorney General did not violate the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2. That Clause requires the President to appoint principal officers, "by and with the Advice and Consent of the Senate," but permits Congress to vest the appointment of "inferior Officers * * * in the President alone, in the Courts of Law, or in the Heads of Departments." Ibid.; see Lucia v. SEC, 138 S. Ct. 2044, 2051 & n.3 (2018); Edmond v. United States, 520 U.S. 651, 660 (1997).

Although the Attorney General is surely a principal officer for purposes of the Appointments Clause (Mot. 21), an individual

who merely acts temporarily as Attorney General is not. Both longstanding precedent of this Court and historical practice demonstrate that "the temporary nature of active service weighs against principal-officer status." OLC Memorandum 10. In United States v. Eaton, 169 U.S. 331 (1898), the Court held that a "subordinate officer" (there, a vice-consul) may be "charged with the performance of the duty of" a principal officer "for a limited time, and under special and temporary conditions," without being "thereby transformed into" a principal officer, id. at 343. The Court therefore rejected an Appointments Clause challenge to a statutory and regulatory arrangement under which the vice-consul, who was not appointed as a principal officer, temporarily functioned as an acting principal officer (consul-general) during a vacancy. See id. at 331-332, 339-340, 343-344.

Nor is Eaton exceptional. As the Court noted, the "practice of the Government" for decades before that case confirmed the shared understanding of both the Legislative and Executive Branches that, consistent with the Appointments Clause, a non-Senate-confirmed individual may serve temporarily as an acting principal officer. Eaton, 169 U.S. at 344 (citation omitted). Congress first authorized the President to make such designations in 1792, when it enacted a measure allowing the President to direct "any person or persons" (without regard to prior Senate confirmation, or even prior "officer" status) to perform

temporarily the duties of the Secretary of State, Secretary of the Treasury, or Secretary of War during a vacancy in those offices. Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281. In 1863, Congress extended that authority to vacancies in the office of "the head of any Executive Department." Act of Feb. 20, 1863, ch. 45, 12 Stat. 656. Presidents exercised that statutory authority repeatedly, designating non-Senate-confirmed individuals to serve as acting principal officers on more than 160 occasions before 1860. See OLC Memorandum 12-16. And non-Senate-confirmed individuals served as Acting Attorney General on a number of occasions. See id. at 16-18.

As this Court concluded in NLRB v. Noel Canning, 134 S. Ct. 2550 (2014), such "historical practice" is entitled to "significant weight" in addressing the separation of powers. Id. at 2559 (emphases omitted). Given the "limited" and "temporary" nature of his duties, Eaton, 169 U.S. at 343, an Acting Attorney General is not a principal officer for purposes of the Appointments Clause. Congress has permissibly vested the authority to select non-Senate-confirmed officials to be Acting Attorney General (or any of numerous other acting officers) in the President alone. By doing that in the FVRA, it restored a power that it had repeatedly granted to the President with respect to the heads of executive departments in multiple statutes between 1792 and 1863. See OLC Memorandum 11-12. A contrary conclusion could seriously undermine

the functioning of the Executive Branch, particularly in times of presidential transitions when an incoming President must rely to a significant extent on acting officials. See id. at 27; cf. 144 Cong. Rec. 27496 (1998) (statement of Sen. Thompson) (explaining that Section 3345(a)(3) was added to the bill that was the basis for the FVRA to address the concern that "early in a presidential administration * * * there will not be a large number of Senate-confirmed officers in the government").

Petitioner asserts (Mot. 24) that Eaton's holding applies only "during periods of exigency," but this Court has never suggested such a limiting gloss. In Eaton itself, the Court stated that Congress's "manifest purpose" in distinguishing between consuls and vice-consuls was to "limit the period of duty to be performed by the vice-consuls and thereby to deprive them of the character of consuls in the broader and more permanent sense of that word." 169 U.S. at 343. Thus, the "special and temporary conditions" recognized in Eaton were not the particular exigency associated with the facts of that case, but the limits of the then-existent statutory and regulatory procedures, which permitted service in any case of "the absence or the temporary inability of the consul-general," whatever the cause. Id. at 342-343; see id. at 341.

Moreover, the Court has consistently described Eaton as turning on the temporary nature of the service, not on any

particular exigency. In Edmond, for example, the Court explained Eaton as finding that "a vice consul charged temporarily with the duties of the consul" was an inferior officer, 520 U.S. at 661, with no mention of any emergency circumstances. Likewise, in Morrison v. Olson, 487 U.S. 654 (1988), the Court described Eaton as approving of the practice of appointing acting vice-consuls "during the temporary absence of the consul," id. at 672, again without reference to any emergency other than the vacancy itself. See id. at 721 (Scalia, J., dissenting) (noting that Eaton "held that the appointment * * * of a 'vice-consul,' charged with the duty of temporarily performing the function of the consul, did not violate the Appointments Clause"); cf. Free Enter. Fund v. Public Co. Accounting Oversight Bd., 537 F.3d 667, 708 n.17 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (citing Eaton for the proposition that "[t]he temporary nature of the office is the * * * reason that acting heads of departments are permitted to exercise authority without Senate confirmation"), aff'd in part, rev'd in part, and remanded by 561 U.S. 447 (2010). Mr. Whitaker's designation is merely temporary and therefore falls within the ambit of Eaton as this Court has understood that decision.

Petitioner's contention (Mot. 25) that Eaton is distinguishable because it concerned "consular officers" abroad is also mistaken. The decision was not based on the nature of the office at issue. Indeed, the Court explained that a contrary

decision would "render void any and every delegation of power to an inferior to perform under any circumstances or exigency." Eaton, 169 U.S. at 343 (emphases added). Nor can petitioner's distinction be reconciled with the Appointments Clause, which applies equally to "public Ministers and Consuls * * * and all other Officers of the United States." U.S. Const. Art. II, § 2, Cl. 2. There is not one constitutional rule for consuls and vice-consuls and another for domestic officers, but rather a single Appointments Clause that has long been understood to permit the President to make a temporary acting designation like the one at issue here.

CONCLUSION

For the foregoing reasons, petitioner's motion to substitute should be denied.

Respectfully submitted.

NOEL J. FRANCISCO.
Solicitor General
Counsel of Record

NOVEMBER 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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*

BARRY MICHAELS,

*

Plaintiff,

v.

*

MATTHEW G. WHITAKER, IN HIS OFFICIAL CAPACITY,

Case No. 18-cv-2906

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Defendant.

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MEMORANDUM IN SUPPORT OF PLAINTIFF'S EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The President has forced out the Senate-confirmed Attorney General and purported to name a hand-picked, non-confirmed Department of Justice employee as the Acting Attorney General under the Vacancies Reform Act, 5 U.S.C. §§ 3345-49d (Vacancies Act). The appointment not only gave Mr. Whitaker powers that make him a principal officer rather than a subordinate, but it also did not respond to any special condition that necessitated naming a non-confirmed official. Indeed, Congress has designated the Senate-confirmed Deputy Attorney General to serve in that role in the Attorney General Succession Act, 28 U.S.C. § 508 (AG Act).

The President's appointment of Matthew Whitaker was both unconstitutional and contrary to statute. It is also literally unprecedented. This is the first time in American history that the President has refused to follow the congressionally determined line of succession for one of the Constitution's principal officers.

The Constitution's Appointments Clause requires that the Senate confirm the Attorney General, who is a "principal officer." Supreme Court precedent, early legislation, and historical practice all recognize a single exception: A "subordinate" may serve in temporary and "special circumstances" to maintain the department's unbroken operations. But Mr. Whitaker is no one's subordinate, he was not appointed in response to any such special circumstances, and the President has affirmatively broken the ordinary chain of command. The President planned to remove Mr. Sessions for months, and the Senate-confirmed Deputy Attorney General would otherwise have served by default under the AG Act.

At the very least, the appointment is the subject of great constitutional doubt, which can be avoided by holding that it was not authorized by the Vacancies Act. The Vacancies Act applies to a vacancy "unless" another statute "designates" an acting official, as the AG Act does here. It

therefore authorizes an appointment only when the Senate-confirmed officials specified by the AG Act are unavailable. Both the statutory text and its purpose refute the Government's arguments that the Vacancies Act and AG Act apply concurrently, and moreover that the President can choose between them.

This Court should accordingly hold that Mr. Whitaker was not validly appointed as the Acting Attorney General.

BACKGROUND

The Constitution's Appointments Clause provides that "Officers of the United States" may serve only "by and with the Advice and Consent of the Senate." U.S. Const. art. II, § 2, cl. 2. This requirement applies to "principal officers." *Edmond v. United States*, 520 U.S. 651, 660-63 (1997). The Attorney General, who reports only to the President and is in charge of federal law enforcement, is a paradigmatic principal officer.

In 2017, the Senate confirmed Jeff Sessions as Attorney General. For months, the President criticized Mr. Sessions for recusing from the Department of Justice's investigation into whether the President and his campaign colluded with Russia and obstructed justice. *E.g.*, Devlin Barrett, John Wagner & Seung Min Kim, *Trump and Sessions Feud Over the Direction of the Justice Department*, Wash. Post (Aug. 23, 2018), https://wapo.st/2RHxLWC. It was widely reported that the President would force out Mr. Sessions promptly after the 2018 midterm elections. *E.g.*, Alexandra Hutzler, *Donald Trump Will Fire Jeff Sessions After Midterms, Republicans Say*, Newsweek (Aug. 24, 2018), http://bit.ly/2rrHQLM. He did.

The AG Act provides that other Senate-confirmed officials in the Department will serve if the Attorney General is unavailable. 28 U.S.C. § 508. The Deputy Attorney General may serve; if the Deputy is unavailable, other officials shall do so. *Id.* If those officials are all unavailable,

the statute is silent. An Executive Order issued under the Vacancies Act then specifies other Senate-confirmed officials who will serve as Acting Attorney General. Exec. Order No. 13,787 (Mar. 31, 2017), http://bit.ly/2BVYNnw.

The Deputy Attorney General is Rod Rosenstein, who is best known for overseeing the Russia investigation. When the President forced out Mr. Sessions, Mr. Rosenstein was available to serve as Acting Attorney General, and would have done so as a matter of law had the President done nothing more. But the President has been harshly critical of Mr. Rosenstein's own failure to limit the Russia investigation. *See* Ashley Parker & Amy B. Wang, *Trump Criticizes Democrats, 'Russian witch hunt,' and Coastal Elites at Ohio Rally*, Wash. Post (Aug 4, 2018), https://wapo.st/2G7kzJ8; Pamela Brown *et al.*, *Trump Considering Firing Rosenstein to Check Mueller*, CNN Politics (Apr. 10, 2018), https://cnn.it/2C4RhGZ. He purported to appoint Matthew Whitaker instead, under the Vacancies Act.

Mr. Whitaker was then serving as the Attorney General's Chief of Staff, a non-confirmed position. Previously, he was best known for his public protestation that the Russia investigation should be narrowed or terminated. Matthew Whitaker, *Mueller's Investigation of Trump is Going Too Far*, CNN Opinion (Originally Published Aug. 6. 2017), https://cnn.it/2QEa9ol. Once he took office as Acting Attorney General, Mr. Whitaker appointed his own Chief of Staff from outside the Department of Justice.

ARGUMENT

The Government asserts that the President validly appointed Mr. Whitaker. It bases that assertion on the argument that the President may remove any critical principal officer—such as the Attorney General, the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, and the Director of National Intelligence—whenever he likes and replace all of them with unqualified,

non-confirmed employees rather than the Senate-confirmed officials designated by Congress.[1] In fact, the President's appointment of Mr. Whitaker violated the Constitution's Appointments Clause. At the very least, the appointment raises significant constitutional doubt that can be avoided by holding that the appointment was not authorized by the Vacancies Act.

I. The President's Appointment of Matthew Whitaker Violated the Appointments Clause.

A. The Appointments Clause Requires That the Senate Confirm an Officer Who Exercises the Authority of a Principal Officer And (1) Is Not a Subordinate or (2) Was Not Appointed In Response to "Temporary and Special Conditions."

The requirement of the Appointments Clause that the Senate confirm a principal officer is essential to the separation of powers. *Freytag v. Comm'r*, 501 U.S. 868, 882 (1991). In particular, "Advice and Consent . . . . serves both to curb Executive abuses of the appointment power and 'to promote a judicious choice of [persons] for filling the offices of the union.'" *Edmond v. United States*, 520 U.S. 651, 659-60 (1997) (quoting *The Federalist No. 76*, at 386-87, internal citations omitted). Particularly prescient to these events, "[t]he 'manipulation of official appointments' had long been one of the American revolutionary generation's greatest grievances against executive power, because the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism." *Freytag*, 501 U.S. at 883 (quoting G. Wood, *The Creation of the American Republic 1776-1787*, at 79 (1969)).

The Supreme Court addressed the circumstances in which a government official is a "principal officer" in *Edmond*. There, the Court held that members of the Coast Guard Court of

[1] *See, e.g.*, 10 U.S.C. § 132(b) (automatic succession by Deputy Secretary of Defense); 10 U.S.C. § 154(d) (Vice Chairman of Joint Chiefs of Staff); 50 U.S.C. § 3026(a) (Principal Deputy Director of National Intelligence).

Criminal Appeals were "inferior," not "principal" officers. It reasoned: "Whether one is an 'inferior' officer depends on whether he has a superior," *id.* at 662, explaining:

> [I]n the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.

Id. at 663. The Court explained that its holding was supported by "the views of the first Congress," which created the second-in-command position of "Chief Clerk" to the Secretaries of State and War. The Chief Clerk exercised significant authority within those departments but was designated as an "inferior officer" who reported directly to, and was removable by, the Secretary. *Id.* at 663-64.

The Court in *Edmond* identified *United States v. Eaton*, 169 U.S. 331 (1898), as a case in which an official was not a "principal officer" requiring confirmation. *Eaton* upheld the position of "vice consul"— a designated State Department employee stationed in an overseas mission. *Id.* at 337. Congress defined the vice consul's responsibilities as temporarily performing the responsibilities of the consul-general while the latter was sick or absent, or until a replacement arrived if the consul-general died. The vice consul had two principal officers as superiors. His actions were subject to reversal when the Senate-confirmed consul-general returned to service, or by the replacement official if the consul-general died. The vice consul also reported to, and was subject to replacement by, the Secretary of State. *Id.* at 339.

The vice consul was not a Senate-confirmed officer. The Supreme Court in *Eaton* therefore considered two questions. First, the issue addressed in *Edmond*: Was the "vice consul" a "principal officer" rather than a mere subordinate? Second, in any event, does the Constitution categorically require confirmation whenever even a subordinate exercises the powers of the principal? The Court held that the answer to both questions was "no," such that the vice consul need not be

confirmed. It reasoned that (1) the vice consul was a "subordinate" position; and (2) confirmation was not required because the vice consul exercised the powers of the principal officer only for a "limited time" in response to "temporary and special conditions." 169 U.S. at 343-44; *see also id.* at 343 (a "principal officer" "does not embrace a subordinate *and* temporary officer like that of vice-consul *as defined* in the statute" (emphases added)).

First, the Court held that the vice consul was "a mere subordinate official." 169 U.S. at 344. The Court looked to the job requirements: "The manifest purpose of Congress in classifying and defining the grades of consular offices, in the statute to which we have referred, was to so limit the period of duty to be performed by the vice-consuls and thereby to deprive them of the character of consuls in the broader and more permanent sense of the word." *Id.* at 343. The vice-consul's principal responsibility was to serve only during the consul-general's absence, and the consul-general could of course reverse any decision of the vice-consul on his return, as could the Secretary of State at any time. Vice consuls were accordingly "subordinate officers who were to represent the principals in case of absence." *Id.* at 336; *see also id.* ("subordinate and temporary officer" who would "exercise such authority" of the principal "when the lawful occasion for the performance of the duty arose").

The vice consul was thus merely a previously designated person who could be "called upon to discharge the duties" of the consul-general in an exigency. 169 U.S. at 340. Indeed, the State Department rejected Eaton's use of the title "acting consul-general," specifying that he was instead the "vice-consul-general" temporarily exercising the authority of the consul-general. *Id.* at 333.

Second, the Supreme Court separately addressed whether even a subordinate becomes *ipso facto* a principal officer merely by exercising the principal's authority. *See* 169 U.S. at 333 (addressing "[t]he claim that Congress was without power to vest in the President the appointment

of a subordinate officer, to be charged with the duty of temporarily performing the functions of the consular office"). The Court held that performance of the principal's responsibilities did not always require confirmation. It reasoned that a subordinate must be able to perform the functions of a principal officer in limited circumstances, because otherwise it would be impossible for the government to perform its statutorily assigned responsibilities:

> Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official. To so hold would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered.

Id.

The temporary and special conditions that limited when the vice consul would perform the consul-general's duties were plain from the governing statute. "The manifest object of the provision was to prevent the continued performance of consular duties from being interrupted by any temporary cause, such as absence, sickness or even during an interregnum caused by death and before an incumbent could be appointed." 169 U.S. at 339; *see also id.* (Congress secured "an unbroken performance of consular duties by creating the necessary machinery to have within reach one qualified to perform them, free from any vicissitude which might befall" the consul-general.). The position was necessary "to guard against [the] contingency" that the "public interest must inevitably suffer in consequence of the closing of the consular office." *Id.* at 342. "This was secured by the designation in advance of a subordinate and temporary official who, in the event of happening of the foregoing conditions, would be present to discharge the duties." *Id.* at 339.

B. The President's Appointment of Matthew Whitaker Violated the Appointments Clause.

The Government's argument that Mr. Whitaker's appointment is constitutional requires this Court to collapse the holding of *Eaton* (and *Edmond* as well) into a single question: Is the

appointment "temporary"? By that, the Government means: Will the officer be replaced some day? But that of course makes the Appointments Clause effectively a dead letter, because it permits the President to make *any* appointment without Senate confirmation in any circumstances, including when the President creates the vacancy. The President need only intone that the appointment is "temporary," in the sense that the official will eventually be replaced—even many months later. Indeed, that official could be replaced by *another* "temporary" official. That is not hyperbole. The Opinion of the Office of Legal Counsel approving Mr. Whitaker's appointment asserts that the *only* requirement of the Appointments Clause is that the President formally designate the official's service as "temporary." *See* Memorandum for Emmet T. Flood, Counsel to the President, from Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, *Re: Designating an Acting Attorney General* at 15 (Nov. 14, 2018) (*2018 OLC Opinion*), *attached to* [fill in].

The officials that can serve as Acting Attorney General under the Supreme Court's decisions in *Edmond* and *Eaton* are those specified by Congress under the AG Act: the Deputy Attorney General; and if the Deputy cannot serve, the Associate Attorney General and other designated officials. Even if those officers were not confirmed by the Senate, they would be "subordinates" because Congress designed their job so that they report to the Attorney General. Further, the offices of those officials are classified and defined to perform the duties of the Attorney General only in response to temporary and special conditions—generally the Attorney General's sickness or absence. In every circumstance, their service is necessary for the "unbroken" performance of the Attorney General's responsibilities. Indeed, the Senate confirmed them in the knowledge that they would be called upon if the Attorney General was unavailable.

The officials designated by the AG Act are thus the equivalent of the vice-consul in *Eaton*. But according to the Government, the Supreme Court in that case would equally have upheld an order of the President firing a consul-general and replacing him indefinitely with an *ad hoc*, hand-picked official—for example, the President's personal acquaintance, the consul-general's personal secretary. That is not a reasonable reading of the decision, because it renders all of the Supreme Court's reasoning meaningless.

For the reasons that follow, the Government's argument that the Appointments Clause equally permits the President to appoint Mr. Whitaker lack merit.

1. Mr. Whitaker Is Serving as a Principal Officer, Not a Subordinate.

Under the Appointments Clause, a principal officer is one who has no "superior"—the officer's work is not "directed and supervised at some level by" a principal officer. *Edmond*, 520 U.S. at 651. The inquiry is: How did Congress "classif[y] and define[]" the position? *Eaton*, 169 U.S. at 343. In *Edmond*, the civilian judges of the military court of criminal appeals were not principal officers because their work was overseen by the Judge Advocate General and, in turn, the Secretary of Transportation. *Id.* at 664. In *Eaton*, the vice consul was overseen by the consul-general and (even if the consul-general had died) the Secretary of State. 169 U.S. at 339. Indeed, the Secretary of State took care to ensure that such an official held himself out as the "vice consul-general," not the "acting consul-general." *Id.* at 333.

No part of Matthew Whitaker's position as Acting Attorney General was "classif[ied] and defin[ed]," *Eaton*, 169 U.S. at 343, to ever involve any oversight by any principal officer. He reports directly to the President, and only to the President. There never will be a day in which any principal officer can tell him what to do, or remove him if he refuses.

There is in fact no substantive difference between what Mr. Whitaker does every day in his position and what a permanent Senate-confirmed Attorney General will do. Mr. Whitaker

exercises all of the powers of the Attorney General and bears all of that office's responsibilities. He is never exercising those powers on behalf of some other Senate-confirmed official, in anticipation of that official's return. He is no longer serving as Chief of Staff, but rather has named a replacement.

The fact that Mr. Whitaker will *never* be supervised is a critical distinction. If Mr. Whitaker is not a "principal officer," then *no* non-confirmed person exercising all the powers of a principal officer ever is, if they serve for less than the maximum period under the Vacancies Act. To be sure, even those officials who serve as Acting Attorney General under the AG Act may not be supervised by a principal official during a vacancy. But their *jobs* are defined so as to always remain subject to that supervision. The Senate also confirmed those officers in an expectation that they might perform the Attorney General's functions. Further, they continue to hold their other, subordinate positions. For example, the Deputy Attorney General remains in that position while serving as Acting Attorney General; no other official takes on the Deputy's role.

2. Even If Mr. Whitaker Is an "Inferior Officer," His Performance of the Attorney General's Responsibilities Was Not Necessitated by "Temporary and Special Conditions."

The Government argues that it is sufficient under the Appointments Clause that Mr. Whitaker merely serve "temporarily." But even putting to the side that he is not a subordinate, *see* Part I-A-1, *supra*, the Supreme Court in *Eaton* held that it was *not* sufficient that the appointee's service be "for a limited time." 169 U.S. at 343. It concluded that the Appointments Clause requires the confirmation of an otherwise subordinate officer whose job responsibilities were not limited to "the performance of the duty of the superior for a limited time *and under special and temporary conditions*. *Id.* (emphasis added). In *Eaton* itself, the vice consul served during the consul-general's absence, sickness or death. The Supreme Court recognized that Congress found

it was necessary to designate a vice consul in advance to provide for the "unbroken" operations of the consul. *Id.*

The Government's argument that the appointee's service need only be "temporary" also bears no relationship to the Supreme Court's reasoning in *Eaton*. There, the Court refused to read the Constitution in a way that would make it impossible to ever delegate the responsibilities of a principal officer. Approving every nominally "temporary" appointment goes vastly further and makes the Appointments Clause essentially meaningless.

The Government notably does not even argue that Mr. Whitaker's position is a response to any special condition. He never was designated to serve—by either Congress or the President—when the Attorney General was sick or absent. Rather, the President affirmatively forced out the Attorney General. He did so after significant planning. Further, given the availability of the officials designated by Congress in the AG Act, it was not necessary to appoint anyone else to ensure the Department's unbroken operations. To the contrary, the President "broke" the predetermined line of succession.

Indeed, the President claims the authority to name as Acting Attorney General any GS-15 or above in the Department of Justice (more than 6,000 lawyers) or any Senate-confirmed official from *any* department (of which there are more than 1,200). Mr. Whitaker was the Attorney General's chief of staff. Traditionally, that position involves no substantive portfolio or direct line of authority over the Department's more than 110,000 employees.[2]

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[2] It is also relevant—but not decisive—that the vice consul in *Eaton* and the Senate-confirmed officials identified by the AG Act are designated in advance. Mr. Whitaker was not. That characteristic makes it much less likely that the President can evade the Appointments Clause by appointing an *ad hoc* official to serve his own particular needs in the moment, rather than the interests of the Department as a whole.

C. The Original Vacancies Act and Appointments Close to the Time of the Founding Confirm That the Appointment of Mr. Whitaker Is Unconstitutional.

The appointment in this case is, literally, unprecedented. This is the first time in American history that the President has refused to follow the congressionally determined line of succession for one of the Constitution's "principal officers."[3]

The meaning of the Appointments Clause is informed by the historical practice of Congress and the Executive Branch in the years immediately following the founding. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560-62 (2014). The Government itself recognizes that Congress's adoption of the first Vacancies Act—enacted in 1792—best shows the founders' understanding of the Appointments Clause. *See generally 2018 OLC Opinion* at 11. But that law permitted the President to name acting officials in three departments only temporarily, and only when the officeholder died, or was sick or absent. Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281.

An appointment under that law had none of the features of this one: (1) It did not allow the President to make an appointment if he removed a department head; (2) the appointment could only be in response to special conditions; and (3) the appointment was necessary to provide for the department's unbroken operations, because there were no other officials in a statutorily prescribed

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[3] The only previous appointments that were arguably analogous did not occur until 2003 and 2007. Neither involved the President disregarding a congressionally specified acting official. In 2003, the President appointed an acting official of the Office of Management and Budget under the Vacancies Act, when Congress had also separately granted the President power to name acting officials in that agency. *Designation of Acting Director of the Office of Management and Budget*, 27 Op. O.L.C. 121 (2003). In 2007, the President named a Senate-confirmed officer in the Department of Justice as Acting Attorney General, when all the officials designated by the AG Act were unavailable. The appointment only overrode the Attorney General's own designation of who should serve next. *Authority of the President to Name an Acting Attorney General*, 31 Op. O.L.C. 208 (2007).

line of succession. Indeed, it is striking that Congress did not even believe it was necessary to authorize an acting appointment at all for the Attorney General.[4]

The history of acting service near the time of the founding similarly confirms that the appointment of Mr. Whitaker is unconstitutional. In the most-relevant period, between 1789 and the War of 1812, non-confirmed officials who served on an acting basis were the pre-determined subordinates, who performed the functions of principal officers only in temporary and special circumstances. Almost always, the department's second-in-command stepped in temporarily while the Secretary was briefly sick or away. *See* Exhibit A, *infra*. Those periods precisely track the service of vice-consuls in *Eaton*.

In that time, there were also 21 vacancies in the cabinet and the Office of Postmaster General. *See id.* Overwhelmingly, the President either left the position vacant (twelve times) or appointed another Senate-confirmed official (eight times).

The President temporarily filled the vacancy with a non-confirmed official only one time, at most. The acting official in that singular case was still a subordinate: the department's second-in-command. Further, the appointment was both in response to a special condition and necessary to ensure the department's unbroken operations. With only two weeks left in the Jefferson

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[4] Congress did later extend the Vacancies Act to cover a "vacancy" and to impose a six-month limit on the length of a non-confirmed appointee's service. But that time limit did not merely mirror the requirements of the Appointments Clause. If it did, the statute would have been unnecessary and would not have applied to just three departments. Rather, Congress prohibited an acting appointment from *ever* lasting longer than six months, even when the Appointments Clause would permit it due to an extended exigency. The vice consul in *Eaton*, for example, served for ten months because he was stationed far abroad in Siam, in an era when travel was much more arduous and time-consuming. 169 U.S. at 333-34. Certainly, statutory time limits do not help the Government, as Mr. Whitaker's appointment already exceeds the ten- and thirty-day limits imposed by the next two Vacancies Acts; a 120-day period was not adopted until 1988. *See* Act of July 23, 1868, ch. 227, § 3, 15 Stat. 168, 168; Pub. L. No. 89-554, 80 Stat. 378, 426 (1966); Pub. L. No. 100-398, 102 Stat. 985, 988 (1988).

Administration, the Secretary of War (Henry Dearborn) resigned. *See* Exhibit B at 1, *infra*. The President appointed the department's second-in-command (Chief Clerk John Smith). *Id.* at 2-3; *see also Edmond*, 520 U.S. at 663-64 (discussing Chief Clerks as subordinate officers at the founding). It would have made no sense for Jefferson to nominate someone who could not be confirmed before Madison took office. It was also difficult for any other confirmed Secretary to step in while the cabinet turned over. (In fact, the official biographies of both Congress and the Army state that Dearborn actually continued to serve until the Senate confirmed his permanent successor, suggesting that Smith did not even serve in this period. Exhibit B at 4, 9-10, *infra*.

According to the Government, Mr. Whitaker's appointment is nonetheless supported by later periods of acting service. Those examples would not be evidence of the Appointments Clause's original meaning. The Government offers no explanation of why the President's designation of an Acting Secretary of State in 1850 is a relevant source of information, particularly given that there were periods of acting service near the founding itself.

But the Government's examples don't support its position anyway. Even stretching all the way to 1860, outside of appointments authorized by the Recess Appointments Clause, the President temporarily appointed non-confirmed officials a total of 23 times. Exhibit C, *infra*, at 9-11. The appointee was a subordinate—the department's pre-determined second-in-command—with only a single exception, who served for a total of two days. Each appointment also responded to special conditions: the President's term ended (14 times); the principal officer resigned or died in office (8 times); or the Senate rejected a permanent nominee (once, for the first time in U.S.

history). The President maintained the department's unbroken operations (with only the one, passing exception) by appointing department's the most senior remaining official.[5]

The history of the vacancies specifically in the Office of Attorney General is even worse for the Government. Between 1789 and 1860, presidents repeatedly left the Office vacant—once for seven months—rather than attempting to install a non-confirmed official, just as presidents had in the founding quarter century. In American history, there was only one time that the President ever named a non-confirmed official as Acting Attorney General. That was in 1866. Again, the appointee was a pre-determined subordinate, there were special conditions, and the President maintained the Department's unbroken operations by appointing its second-in-command, rather than naming an *ad hoc* official. Andrew Johnson's Attorney General (James Speed) had resigned in protest of the President's policies. But the country badly needed someone to serve during the ongoing fight over the first civil rights law protecting African Americans. Johnson appointed the second-in-command (Assistant Attorney General J. Hubley Ashton) for six days, apparently while the permanent successor traveled to Washington, D.C.

But even those few, limited examples were too much for Congress. In 1868, it enacted a new Vacancies Act. Act of July 23, 1868, ch. 227, 15 Stat. 168. That statute only allowed the President to name Senate-confirmed officials as acting appointees. And it strictly limited their service to ten days. *Id.*

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[5] The temporary appointment also almost always lasted less than one week. Mr. Whitaker's service is already longer than every example but one. The sole exception arose from special conditions. President Tyler's cabinet resigned to protest his anti-Whig policies. The Senate (controlled by Whigs) strongly resisted the President's nominees, rejecting 7 out of 20 during his presidency. In one instance, it took 43 days to find and confirm an acceptable permanent secretary. Mr. Whitaker's appointment does not implicate that special condition; this Senate is substantially more accommodating of this President.

II. The President's Appointment of Mr. Whitaker Was Not Authorized by the Vacancies Act.

At the very least, given the foregoing, there is significant doubt that the President's appointment of Mr. Whitaker is constitutional. *See NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring) ("Appointing principal officers under the [Vacancies Act], however, raises grave constitutional concerns because the Appointments Clause forbids the President to appoint principal officers without the advice and consent of the Senate."). The Court can avoid that doubt by holding that the appointment was never authorized by statute.

The Government's position requires reading the Vacancies Act itself to violate the Appointments Clause. The statute would allow the President to name an acting principal officer at any time, without the position being classified or defined to report to a principal officer and in the absence of any special conditions, all of which are required by the Supreme Court's decision in *Eaton*. The Whitaker appointment is of course a perfect example. It is a "cardinal principle" of statutory construction that, because it is "fairly possible" to read the Vacancies Act in a way that avoids that constitutional question, the court must reject the Government's interpretation of that statute. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). For the reasons that follow, the Government's reading is plainly wrong in any event.

A. The Vacancies Act Permits the President to Appoint the Acting Attorney General Only When the AG Act Does Not "Designate" a Senate-Confirmed Official.

Properly understood, the AG Act and the Vacancies Act work together in a way that is fully consistent with both of their texts and the Appointments Clause. The President may appoint a non-confirmed acting official in the special condition that the Senate-confirmed officers designated by the AG Act are unavailable.

When the Attorney General is unable to serve, the AG Act designates an order of succession by Senate-confirmed officials: the Deputy may serve; if he does not, then the Associate shall; if they are unavailable, other Senate-confirmed officials serve in the order specified by the Attorney General; if none of those officials are available, the statute is silent. 28 U.S.C. § 508. Having been confirmed, Mr. Rosenstein and the other Senate-confirmed officials are of course proper acting officials under the Appointments Clause. When Mr. Sessions "resigned," Deputy Attorney General Rod Rosenstein was available and would be the Acting Attorney General under the AG Act.

The Vacancies Act did not grant the President the power to appoint a different official. That is true for two independent reasons. First, the Vacancies Act is explicitly inapplicable if another statute "designates" an acting official. The Vacancies Act provides that it is "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any [Senate-confirmed] office of an Executive agency . . ., *unless* – (1) a statutory provision expressly . . . (B) *designates* an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." 5 U.S.C. § 3347(a) (emphases added). To "designate" is to "choose (someone or something) for a particular job or purpose." *Black's Law Dictionary* 541 (10th ed. 2014). The Government concedes that the AG Act, which triggers the "unless" clause, "designates"—*i.e.*, chooses—the officer who performs the functions of the Attorney General in an acting capacity—here, Mr. Rosenstein. The Vacancies Act is therefore inapplicable and did not authorize the President to displace Mr. Rosenstein and appoint Mr. Whitaker in his place.

Second, and independently, even if the Vacancies Act "applies" concurrently when the AG Act designates a successor, the latter statute controls. In that situation, *both* statutes apply. If one took the Government's argument seriously, there are now *two* Acting Attorneys General: Matthew

Whitaker (under the Vacancies Act) and Rod Rosenstein (under the AG Act). No provision makes the AG Act "inapplicable"; the Government concedes as it must that the Vacancies Act's "exclusivity" clause does not apply. Nor does any provision give the President the power to "choose" between the statutes or to override the AG Act. By contrast, for some offices, Congress did in fact give the President the power to override Congress's designation of the default successor. *E.g.*, 38 U.S.C. § 304 (Secretary of Veterans Affairs); 40 U.S.C. § 302(b) (Administrator of General Services); 42 U.S.C. § 902(b)(4) (Commissioner of Social Security).[6]

Indeed, the Supreme Court specifically has made clear that when Congress intended in the Vacancies Act to override a default appointment of an acting official, it did so expressly. The Court explained that, when Congress sought to permit the President to override the default appointee under section 3345(a)(1), it granted that authority "notwithstanding paragraph (1)." *See SW Gen.*, 137 S. Ct. at 936. But on the Government's reasoning, the Supreme Court's reasoning is wrong and that proviso is meaningless, because the President would have the power to "choose" between the two provisions automatically.

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[6] This case of course illustrates how the two statutes produce conflicting results. The AG Act is self-operative; it does not give the President any choice. It designates Mr. Rosenstein as a matter of law. By contrast, under the Vacancies Act, the President had a choice and chose Mr. Whitaker.

The inconsistency is also illustrated by the scenario in which the Attorney General resigns and the President does nothing. If both statutes apply, the Deputy Attorney General is simultaneously not subject to time limits (under the self-operative provisions of the AG Act) and subject to a 210-day limit (as "first assistant" who is the default successor under the Vacancies Act). *Compare* 28 U.S.C. § 508(a), *with* 5 U.S.C. § 3345(a)(1). There is also a conflict if the Deputy is unavailable and the President does not act: the Associate Attorney General "shall" serve (under the AG Act); while simultaneously *no* officer may lawfully hold the position (under the Vacancies Act). *Compare* 28 U.S.C. § 508(b), *with* 5 U.S.C. §§ 3345(a), 3348(b) (office must remain vacant).

Here, there is no such "notwithstanding" language, so both statutes apply. As the Supreme Court again explained with respect to the Vacancies Act, "[i]t is a commonplace of statutory construction that the specific governs the general." *SW Gen.*, 137 S. Ct. at 941 (quoting *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012)) (alterations omitted). That is unquestionably the AG Act.

On the Government's contrary method of interpretation, numerous cases dealing with inconsistencies between general and specific statutes are all wrongly decided. So long as the statutes were "non-exclusive," the President need only to have "chosen" which one to apply.

By contrast, there is a special circumstance in which the President could appoint the Acting Attorney General under the Vacancies Act consistent with both the statute and the Appointments Clause: when none of the Senate-confirmed officials specified by the AG Act are available. That will happen most often during the transition between presidential administrations, when political appointees resign or are removed. The Vacancies Act itself recognizes that scenario deserves special attention. 5 U.S.C. § 3349a (allowing non-confirmed officers to serve for a longer period during presidential transitions).

In that circumstance, the AG Act does *not* "designate" the successor; it is silent on who should serve. 5 U.S.C. § 508. The Vacancies Act is then the "exclusive" means to select the acting official, 5 U.S.C. § 3347(a), empowering the President to select either a Senate-confirmed official or an established, career employee, *id.* § 3345(a)(2)-(3). Indeed, the President's Executive Order governing succession in the Office of the Attorney General reconciles the statutes in exactly that way; it identifies the acting officials who will serve when those identified by the AG Act cannot. Exec. Order No. 13,787 (Mar. 31, 2017), http://bit.ly/2BVYNnw.

B. The Court Should Reject the Government's Interpretation of the Vacancies Act.

The Government argues that the Vacancies Act is "applicable to the office of Attorney General," but its provisions are "not the 'exclusive means'" for appointing the Attorney General and other principal officers. *2018 OLC Opinion* at 5, 7. The Government assumes that would mean the President has a choice: follow the procedures of the Vacancies Act; or allow the AG Act to designate the official automatically. *But see* Part II.A., *supra* (explaining that the AG Act is controlling even if the statutes are non-exclusive because it is more specific). In fact, the Government's interpretation cannot be reconciled with the statutory text or Congress's purpose in enacting it.

1. Under the plain statutory text, the Vacancies Act does not apply concurrently with an office-specific designation statute.

The Government ignores that a provision of the Vacancies Act specifies that the statute is never "non-exclusive." Whenever the Vacancies Act "applies" to a vacancy, it is the *only* mechanism to appoint an acting official. Under Section 3348(d), for any "vacant office to which [the Vacancies Act] appl[ies]," "[a]n action taken by any person who is not acting under sections 3345, 3346, or 3347 . . . shall have no force and effect" and subsequently "may not be ratified." 5 U.S.C. § 3348(d); *id.* (the sole exception, which is not applicable here, is if an office-head performs the responsibilities of a subordinate). This provision authorizes only acts by someone "serving as an acting officer under the [Vacancies Act]." *SW Gen.*, 137 S. Ct. at 939; *see also id.* (under the President's authority to appoint officials under Section 3345(b)(1), the phrase "persons serving under this section" are those "acting officers serving at the President's behest"). Hence, the Government cannot be right that there are circumstances in which the Vacancies Act is "non-exclusive" and permits the President to choose between its provisions and office-specific

succession statute such as the AG Act; Section 3348(d) would void any act pursuant to the latter as a matter of law.[7]

Thus, contrary to the Government's submission, Section 3347(a) does not render the Vacancies Act "applicable but non-exclusive" when another statute specifies a successor for a particular office. Under Section 3348(d), if the Vacancies Act applies to a vacancy, it is *never* non-exclusive. Only the provisions of the Vacancies Act apply.

The Government also misreads Section 3347(a), which does not override Section 3348(d). As discussed, that provision makes the Vacancies Act exclusive "unless" something else occurs—*viz.*, another statute "designates" the acting official. Effectively, Section 3347(a) provides: "The Vacancies Act is the exclusive means to authorize an acting official, unless another statute expressly selects that official." Read naturally, that language recognizes that the mandatory, office-specific provision chooses the acting official. It does not grant the President a choice to use the Vacancies Act to override the more-specific "designation."

Another exception to Section 3347(a) demonstrates that the Government's reading is incorrect. The Vacancies Act is also not "exclusive" with respect to "the General Accountability Office" (GAO). 5 U.S.C. § 3347. That exception obviously seeks to exclude the GAO, which has its own provision requiring bipartisan appointments. *See* 31 U.S.C. § 703. The Vacancies Act consistently excludes it. *See* 5 U.S.C. §§ 3345, 3347(a), 3347(b), 3348(b), 3348(e), 3349(a). But

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[7] A person "who is *not acting under* section 3345, 3346, or 3347," 5 U.S.C. § 3348(d)(1) (emphasis added), is someone who "is acting under" some other statutory authority. For example, when the Deputy Attorney General serves temporarily as the Acting Attorney General under the AG Act, he is "not acting under sections 3345, 3346, or 3347." If Congress intended to approve acts under statutes that are exempt from the Vacancies Act, it would have used the same formulation as Section 3348(b) and referred to "an officer or employee [who] is performing the functions and duties *in accordance with* sections 3345, 3346, and 3347" (emphasis added).

under the Government's reading, the Vacancies Act *does* apply to the GAO; the statute is merely "non-exclusive" and gives the President the choice whether to follow it.

2. Congress enacted the Vacancies Act precisely to reject the argument that it is "non-exclusive," while preserving the AG Act and other office-specific designation statutes.

The Government's reading also cannot be reconciled with the well-documented history and purpose of the Vacancies Act, including Section 3347(a)'s "exclusivity" clause. Congress adopted the statute precisely to *prevent* the President from treating the statute as "non-exclusive" when it applied. The Government's reading turns the Vacancies Act on its head and creates the problem Congress was trying to solve.

The predecessor vacancies statute was silent on whether, when it applied, other provisions could also be used to name an acting official. 5 U.S.C. §§ 3346-49 (1966). The Office of Legal Counsel made much of the fact that the statute lacked a provision that made it the "exclusive" means of appointing officials. *See The Vacancies Act*, 22 Op. O.L.C. 44, 44 (Mar. 18, 1998) ("The Vacancies Act is not the exclusive authority for temporarily assigning the duties of a Senate confirmed office. Statutes vesting an agency's powers in the agency head and allowing delegation to subordinate officials also may be used to assign, on an interim basis, the duties of certain vacant Senate-confirmed offices."). On that basis, it asserted that acting officials also could be named (first in the Department of Justice, and later in other departments) under the Attorney General's general authority to delegate powers to non-confirmed officials. Among other things, use of those delegation statutes ostensibly allowed those officials to serve indefinitely, avoiding the strict time limits of the existing vacancies statute. *Id.*

Under the Office of Legal Counsel's position, administrations filled almost 20 percent of Senate-confirmed positions with non-confirmed officials. *See SW Gen.*, 137 S. Ct. at 936. That created an enormous controversy that came to a head in 1997 when President Clinton delegated

the authority of the Assistant Attorney General for Civil Rights to Bill Lann Lee, who the Senate had refused to confirm. *Id*.

Congress enacted the Vacancies Act shortly thereafter for the specific purpose of rejecting the Office of Legal Counsel's position. *See, e.g.*, *Oversight of the Implementation of the Vacancies Act: Hearing on S. 1764 Before the S. Comm. on Governmental Affairs*, 105th Cong. 54 (1998) (*1998 Hearing*) (S. 1764 § 2 [Findings]). The statute's evolution demonstrates that Congress intended that the statute (1) would be exclusive when it applied, and (2) would not override office-specific designation statutes.

The early drafts of the Vacancies Act loosely provided that it would be "applicable to any office" and moreover lacked a provision forbidding the President from using another statute to fill a vacancy. *See 1998 Hearing* 58 (S. 1764 § 3); S. Rep. No. 105-250, at 26 (1998) (S. 2176, 105th Cong. sec. 2, § 3347 (1998)). The Department of Justice's testimony on the bills made clear that it would not treat that legislation as sufficient to make the Vacancies Act "the exclusive authority for temporarily assigning the duties and powers of a Senate-confirmed office." *1998 Hearing* 139 (Department's written testimony).

In response, Congress changed the statutory language in three ways. First, it added Section 3347(b), which states that "[a]ny statutory provision providing general authority . . . to delegate duties" does not trigger the statute's exemptions.

Second, Congress added an "enforcement mechanism for the statute." S. Rep. 105-250, at 17. That was Section 3348(d), which—for offices subject to the Vacancies Act—forbade the President from choosing between its provisions and another source of statutory authority. *See supra* at 20.

Third, Congress substituted the word "exclusive" for "applicable to"—using the *precise* word that the Department of Justice had repeatedly stressed was missing from the prior Vacancies Act. The principal sponsor of the legislation explained the change, and made clear that it did not alter the rule that office-specific designation statutes would remain an "exception" to the Vacancies Act:

> The phrase "applicable to" is replaced by "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of" in § 3347(a) to ensure that the Vacancies Act provides the sole means by which temporary officers may be appointed unless contrary statutory language as set forth by this legislation *creates an explicit exception*.

144 Cong. Rec. S12813 (Oct. 21, 1998) (Sen. Thompson) (emphasis added); *see also* 144 Cong. Rec. S11022-23 (Sept. 28, 1998) (Sen. Thompson) ("The bill will extend the provisions of the Vacancies Act to cover all advice and consent provisions in executive Agencies *except those* that are covered by express specific statute[s] that provide for acting officers to carry out the functions and duties of the office.") (emphasis added).

Congress's focused purpose to reject the Office of Legal Counsel's position that the Vacancies Act is "non-exclusive" is laid out unambiguously in fine detail in two Congressional Research Service Reports, an extensive congressional hearing that included written and oral testimony from the Department of Justice, a Senate report on the draft bill, and multiple detailed floor statements.[8] It involved "months of study, months of discussion, and months of difficult negotiation." 144 Cong. Rec. S11025 (Sept. 28, 1998) (Sen. Byrd). But there is not one word in

[8] *See* Morton Rosenberg, Cong. Research Serv., *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative* (1998); Morton Rosenberg, Cong. Research Serv., *Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights* (Jan. 1998); *1998 Hearing* 25, 122, 129; S. Rep. No. 105-250; 144 Cong. Rec. S12823 (Oct. 21, 1998) (Sen. Thompson); *id.* at S12824 (Sen. Byrd).

any of those voluminous materials stating that Congress intended to grant the President the power that the Government claims here. Just as important, the Department of Justice never even *requested* that authority. *See supra* at 23 (describing congressional testimony); *see also* Statement of Administration Policy – Federal Vacancies Act of 1998 (Sept. 24, 1998), https://bit.ly/2rvtI4k.

If Congress intended the Vacancies Act to mean what the Government now claims, someone would have said something somewhere at some point, because its implications are startling. Here, the President has overridden the congressionally determined line of Senate-confirmed officials who succeed the nation's chief law enforcement officer, asserting that he could select from thousands of lawyers in the Department or more than a thousand other Senate-confirmed officials. But that is just the beginning. As discussed, the Government's position would grant the President the same power with respect to the indistinguishable office-specific statutes for other critical positions such as the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, and the Director of National Intelligence. According to the Government, Congress intended to permit the President to replace all those officials with any of thousands of senior staff members or any Senate-confirmed officer—any of, for example, the seven members of the Social Security Advisory Board, the two trustees of the Federal Old-Age and Survivors Trust Fund, and the nine Directors of the Corporation for Public Broadcasting.

Congress also would have known that it would be departing from the very-well-settled understanding of *both* the legislative and executive branches regarding the relationship between the general vacancies statute and other statutes that designate successors for specific offices. As discussed, the Department of Justice had maintained that the prior vacancies laws were "non-exclusive," just as it now argues with respect to the current statute. And Congress had enacted numerous other statutes designating acting principal officers beginning more than a century ago

as well. But in all that time, the President apparently *never once* used the general provisions of the "non-exclusive" vacancies statute to override an office-specific designation statute.

Those settled office-specific statutes, moreover, have one plain overriding purpose: to permit the Senate to confirm officers in the line of succession who will be qualified to fill in for the principal officer, rather than allowing the President to make his own hand-picked choice from among thousands of unqualified candidates. By contrast, for some less-significant offices, Congress gave the President the power to override its designation of a default successor; it did so in plain and simple terms. *See supra* at 18. The Government's reading requires believing that Congress intended to eliminate those significant restrictions on the President, in ham-fisted statutory language without any member of Congress or the Administration mentioning it.

Reading the Vacancies Act that way violates numerous settled principles of statutory construction, not just the canon of constitutional avoidance. It is settled that Congress does not fundamentally alter detailed statutory schemes "in vague terms or ancillary provisions"; it does not put "elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001).

Nor does it reject long-settled practices by implication. *Rehberg v. Paulk*, 566 U.S. 356, 361-62 (2012). That is particularly so when Congress knows how to achieve the same result more directly. *See, e.g.*, *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169 (2014); *Whitfield v. United States*, 543 U.S. 209, 216 (2005). The Supreme Court has indeed rejected an interpretation of the Vacancies Act where Congress "could easily have chosen clearer language." *SW Gen.*, 137 S. Ct. at 939.

C. The Government's Counter-Arguments Lack Merit.

The Government argues to the contrary that its position is supported by a provision of the Vacancies Act that excludes certain independent, multi-member bodies. 5 U.S.C. § 3347c (excluding, for example, a body "composed of multiple members" that "governs an independent

establishment or Government corporation"). The Government finds it striking that the AG Act is not included. But as the Supreme Court has explained in rejecting a similar argument by the Government under the Vacancies Act, an item will be excluded by implication only if the text provides "a sensible inference that the term left out must have been meant to be excluded." *SW Gen.* 137 S. Ct. at 940. Here, it does not. Nothing suggests that Congress intended that provision to provide an exhaustive list of offices to which the Vacancies Act does not apply. It obviously does not, as other provisions of the statute exclude other offices. *See* 5 U.S.C. § 3349b (excluding statutes addressing "holdover" officers); *id.* § 3349(e) (excluding various specific offices from Vacancies Act's enforcement provisions). The reason Congress excluded those multi-member agencies is that they are not "an Executive agency" subject to the Vacancies Act in the first place. *Id.* § 3347. The legislative history makes clear "that [it] has always been the case" that these entities were exempt, and Congress added the provision merely "to avoid any confusion." S. Rep. 105-250, at 22.

The Government also makes passing arguments about the text of the AG Act. But the dispositive point about that statute is undisputed: it "designates" the Acting Attorney General. *See supra* at 17. It therefore makes no difference that the AG Act says the Deputy Attorney General "may" serve (whereas other officials "shall" do so) and is the "first assistant to the Attorney General." 28 U.S.C. § 508(a). Of note, both those provisions were in the statute before Congress enacted the Vacancies Act in 1998, at a time that the Government concedes the AG Act was exclusive, mandatory, and self-operating. Congress did not fundamentally change the meaning of those provisions—and thus the statute as a whole—by failing to delete them in 1998.

Section 508(a) always reflected the possibility that the Deputy "may" be unavailable, thus triggering the Act's remaining succession rules. The statute essentially answers the question "Who

will be Acting Attorney General?" by providing: "The Deputy Attorney General may serve, and if not the Associate Attorney General shall." Section 508 does not say anything like the President "may choose" or the statute "may apply." At most, the word "may" could be stretched to mean that the Deputy has a choice. Congress could not possibly have adopted that language to provide instead that a different statute could designate the Acting Attorney General, because when the AG Act was adopted, no other statute even arguably could do so.

The Government's reliance on the "first assistant" provision is also misplaced. That provision never had any substantive effect. It was enacted together with the prior vacancies act, which expressly did not apply to the Attorney General, so it literally did nothing. 5 U.S.C. § 3347 (1966). And the Government itself believes that the clause does nothing *even today*, because automatic appointments under the AG Act are not subject to the Vacancies Act, which restricts the appointee's length of service.

The Government next argues that the statutory history supports its position because the predecessor vacancies act and also the first draft Senate bill of the 1998 legislation expressly excluded the Office of the Attorney General, but the final statute does not. *2018 OLC Opinion* at 5 & n.5. But the reason is obvious: Congress instead wrote a *broader* exception for *every* statute that "designates" a successor for a specific office. 5 U.S.C. § 3347(a)(1)(B). As the Supreme Court explained in rejecting a similar argument by the Government: "In short, Congress took a provision that explicitly applied only to [the AG Act] and turned it into one that applies to all [officer-specific succession statutes]." *SW Gen.*, 137 S. Ct. at 942. Leaving in a provision directed only at the Attorney General would have created confusion about the status of all the other office-specific designation statutes.

Contrary to the Government's suggestion, *2018 OLC Opinion* at 4, the Senate Report on the first Senate bill did not state that the legislation would be non-exclusive. It said the exact opposite: that "statutes that themselves stipulate who shall serve in a specific office" were "express exceptions" to its provisions. S. Rep. No. 105-250, at 2; *see also supra* at 24 (Senate sponsor making the same point). The Government asserts the contrary based solely on part of one sentence, wrenched from its context. That sentence actually explained what "*would*" occur if Congress were "to *repeal* those [office-specific] statutes in favor of the procedures contained in the Vacancies Act." *Id.* at 17 (emphases added).

Finally, the Government relies on a few decisions of other courts. Two districts court have recently accepted the Government's argument in dictum, albeit on the basis of very truncated submissions. *United States v. Peters*, No. 6:17-CR-55-REW-HAI-2, 2018 WL 6313534, at *1 (E.D. Ky. Dec. 3, 2018); *United States v. Valencia*, No. 5:17-CR-882, 2018 WL 6182755 (W.D. Tex. Nov. 27, 2018). The briefing presented to those courts did not approach the level of detail in this Memorandum and the Government's related submissions.

The two other cases relied on by the Government are distinguishable or unpersuasive. The Ninth Circuit has stated in brief dictum that the Vacancies Act is "non-exclusive." *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 555-56 (9th Cir. 2016). But it was undisputed that the President could choose the official in that case (the Acting General Counsel of the National Labor Relations Board). *Id.* The Ninth Circuit also rested its decision heavily on the one sentence in the Senate Report cited by the Government. The court was apparently unaware that the Report makes clear that office-specific designation statutes remained "exceptions" to the bill; nor apparently was it aware of the remainder of the statute's history. *See supra* at 22-26.

A district court upheld the President's appointment of an Acting Director of the Consumer Financial Protection Board when the Director resigned. *English v. Trump*, 279 F. Supp. 3d 307, 323-24 (D.D.C. 2018). But that decision is easily distinguishable as well. The court itself distinguished the AG Act as a statute that would displace the Vacancies Act. *Id.* The court also indicated that only the President had statutory authority to make the appointment because the Deputy Director could serve in an acting capacity only in cases of the Director's "absence or unavailability," not a resignation. *Id.* The court finally reasoned that its holding result was more consistent with the President's own constitutional authority to participate in selecting principal officers, because the Deputy Director was chosen by the Director. *Id.* That reasoning does not apply to the Deputy Attorney General, who is selected by the President.

CONCLUSION

The Court should hold that the President's Appointment of Matthew Whitaker violates the Appointments Clause and is not authorized by the Vacancies Act.

Dated: December 11, 2018

Respectfully submitted,

By: /s/ Thomas C. Goldstein

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INDEX OF EXHIBITS

EXHIBIT A

FOUNDING ERA APPOINTMENTS*

Gaps left vacant (12)

1. Secretary of the Treasury Alexander Hamilton, resigned 1/31/1795 – Oliver Wolcott, Jr. nominated 2/2/1795; confirmed 2/3/1795; commissioned and entered upon duties 2/2/1795 (1 day gap).

2. Secretary of War Henry Knox, resigned 12/28/1794 and served until 12/31/1794 – Timothy Pickering nominated, confirmed, commissioned, and entered upon duties 1/2/1795 (1 day gap).

3. Attorney General Edmund Randolph, commissioned Secretary of State 1/2/1794 – William Bradford nominated 1/24/1794; confirmed and commissioned 1/27/1794; entered upon duties 1/29/1794 (27 day gap).

4. Attorney General William Bradford, died 8/23/1795 – Charles Lee nominated 12/9/1795; confirmed, commissioned, and entered upon duties 12/10/1795 (3 month, 17 day gap).

5. Postmaster General Timothy Pickering, commissioned Secretary of War 1/2/1795 – Joseph Habersham nominated 2/24/1795; confirmed and commissioned 2/25/1795 (54 day gap).

6. Secretary of the Navy, newly created post 4/30/1798, declined by George Cabot on 5/11/1798, who was nominated 5/1/1798, and confirmed and commissioned 5/3/1798 to new post, declined – office vacant until Benjamin Stoddert nominated 5/18/1798; confirmed and commissioned 5/21/1798; and entered upon duties 6/18/1798 (49 day gap).

7. Secretary of the Treasury Samuel Dexter, resigned 4/20/1801, and served until 5/6/1801 – Albert Gallatin recess appointed and commissioned 5/14/1801 (8 day gap).

8. Attorney General Levi Lincoln, resigned 12/28/1804 and served until 12/31/1804 – Robert Smith (Secretary of the Navy) nominated and confirmed 3/2/1805, commissioned 3/3/1805, but never took office – post remained vacant until next administration – next President left the post vacant until John Breckenridge was recess appointed and commissioned, and entered upon duties 8/7/1805 (7 month, 7 day gap).

9. Postmaster General Joseph Habersham, resigned 11/2/1801 – Gideon Granger recess appointment, commissioned, and entered upon duties 11/28/1801 (26 day gap).

10. Attorney General John Breckenridge, died 12/14/1806 – Caesar A. Rodney nominated 1/15/1807; confirmed and commissioned 1/20/1807 (37 days later).

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* This appendix is compiled from information found in Robert Brent Mosher, *Executive Register of the United States: 1789-1902* (1903).

11. Secretary of State James Madison, inaugurated President 3/4/1809 – Robert Smith nominated, confirmed, commissioned, and entered upon duties 3/6/1809 (1 day gap).

12. Attorney General Caesar A. Rodney, resigned 12/5/1811 – William Pinkney nominated 12/10/1811; confirmed and commissioned 12/11/1811; and entered upon duties 1/6/1812 (32 day gap).

Gaps where Senate-confirmed officer was appointed to serve (8)

1. Secretary of State Edmund Randolph, resigned 8/20/1795 – Timothy Pickering (Secretary of War) served *ad interim* until he was nominated 12/9/1795 and confirmed and commissioned 12/10/1795.

2. Secretary of War Timothy Pickering, commissioned Secretary of State 12/10/1795 – Pickering (now Secretary of State) served *ad interim* until James McHenry was nominated, confirmed, and entered upon duties 2/6/1796.

3. Secretary of State Timothy Pickering, fired 5/12/1800 – Charles Lee (Attorney General) served *ad interim* until John Marshall was nominated 5/12/1800; confirmed and commissioned 5/13/1800; and entered upon duties 6/6/1800.

4. Secretary of State John Marshall, commissioned Chief Justice 1/31/1801, served until 2/4/1801 – John Marshall (now Chief Justice) began *ad interim* service 2/4/1801 (3 day gap) and served until the end of the administration.

5. Secretary of War James McHenry, was asked by President Adams to resign, and he did 5/31/1800 – Benjamin Stoddert (Secretary of the Navy) served *ad interim* until Samuel Dexter was nominated 5/12/1800; confirmed and commissioned 5/13/1800; and entered upon duties 6/12/1800.

6. Secretary of War Samuel Dexter, commissioned Secretary of the Treasury 1/1/1801 – Samuel Dexter (now Secretary of Treasury) served *ad interim* until the end of the administration.

7. *Ad interim* Secretary of State John Marshall (Chief Justice), replaced by Levi Lincoln (Attorney General) on 3/4/1801 as *ad interim* Secretary of State, at the start of the Jefferson Administration, until James Madison was nominated and commissioned 3/5/1801, and entered upon duties 5/2/1801.

8. Secretary of the Navy Benjamin Stoddert, resigned 2/18/1801 and served until 3/31/1801 – Henry Dearborn (Secretary of War) served *ad interim* until Robert Smith was recess appointed and commissioned 7/15/1801, and entered upon duties 7/27/1801.

Non-Senate-confirmed officer serving during exigency (1)

1. Secretary of War Henry Dearborn, resigned 2/16/1809 – John Smith (Chief Clerk) served *ad interim* for the final two weeks of the Jefferson administration, and continued until William Eustis was nominated 3/6/1809; confirmed and commissioned 3/7/1809 (3 days after the start of the Madison administration); and entered upon duties 4/8/1809.

EXHIBIT B

Founders Online

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To Thomas Jefferson from Henry Dearborn, 16 February 1809

Sir, Washington Februy. 16th. 1809

I accept with gratefull feelings the recent mark of your friendship, and having taken the requisite steps for authorising my entering on the duties of my new office, I hereby resign the office of Secretary of the Department of War.—be pleased Sir to accept my most sincere thanks for the many obligations you have confered on me.

and believe to be with the highest respect & esteem your sincere friend.

H. Dearborn

SOURCE PROJECT	Jefferson Papers
TITLE	To Thomas Jefferson from Henry Dearborn, 16 February 1809
AUTHOR	Dearborn, Henry
RECIPIENT	Jefferson, Thomas
DATE	16 February 1809
CITE AS	"To Thomas Jefferson from Henry Dearborn, 16 February 1809," *Founders Online,* National Archives, last modified June 13, 2018, http://founders.archives.gov/documents/Jefferson/99-01-02-9810. [This is an **Early Access document** from The Papers of Thomas Jefferson. It is not an authoritative final version.]

Founders Online

From Thomas Jefferson to War Department, 17 February 1809

Whereas, by the resignation of Henry Dearborne, late Secretary at War, that office is become vacant. I therefore do hereby authorize John Smith, chief clerk of the office of the Department of War, to perform the duties of the said office, until a successor be appointed. Given under my hand at Washington this 17th. day of February 1809.

Th: Jefferson

DNA: RG 107—LRUS—Letters Received by the Secretary of War, Unregistered Series.

EARLY ACCESS LINK https://founders.archives.gov/documents/Jefferson/99-01-02-9824
What's this?

Back to top

SOURCE PROJECT	Jefferson Papers
TITLE	From Thomas Jefferson to War Department, 17 February 1809
AUTHOR	Jefferson, Thomas
RECIPIENT	War Department
DATE	17 February 1809
CITE AS	"From Thomas Jefferson to War Department, 17 February 1809," *Founders Online,* National Archives, last modified June 13, 2018, http://founders.archives.gov/documents/Jefferson/99-01-02-9824. [This is an **Early Access document** from The Papers of Thomas Jefferson. It is not an authoritative final version.]

Founders Online

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To Thomas Jefferson from John Smith, 17 February 1809

Sir, Feb: 17th. 1809

I have had the honor of receiving your commission to perform the duties of Secretary at War until a successor be appointed to General Dearborn late Secretary.—Permit me to express to you my gratitude for this evidence of your confidence, and to assure you that, while I regret that some one more competent had not received the commission, as far as I am capable its duties shall be faithfully executed

I have the honor to be, Sir, with perfect respect & esteem Your Ob. Sevt.

Jno. Smith

DNA: RG 59—LAR—Letters of Application and Recommendation.

SOURCE PROJECT	Jefferson Papers
TITLE	To Thomas Jefferson from John Smith, 17 February 1809
AUTHOR	Smith, John
RECIPIENT	Jefferson, Thomas
DATE	17 February 1809
CITE AS	"To Thomas Jefferson from John Smith, 17 February 1809," *Founders Online,* National Archives, last modified June 13, 2018, http://founders.archives.gov/documents/Jefferson/99-01-02-9825. [This is an **Early Access document** from The Papers of Thomas Jefferson. It is not an authoritative final version.]

DEARBORN, Henry, (1751 - 1829)

DEARBORN, Henry, (father of Henry Alexander Scammell Dearborn), a Representative from Massachusetts; born in North Hampton, N.H., February 23, 1751; attended the public schools; studied medicine; commenced practice in Nottingham Square in 1772; during the Revolutionary War was a captain in Stark's Regiment and participated in the Battle of Bunker Hill; accompanied Arnold's expedition to Canada and took part in the storming of Quebec; was taken prisoner, but was released on parole in May 1776; joined Washington's staff in 1781 as deputy quartermaster general with rank of colonel, and served at the siege of Yorktown; moved to Monmouth, Mass. (now Maine), in June 1784; elected brigadier general of militia in 1787 and made major general in 1789; appointed United States marshal for the district of Maine in 1789; elected as an Anti-Administration candidate from a Maine district of Massachusetts to the Third Congress and reelected as a Republican to the Fourth Congress (March 4, 1793-March 3, 1797); appointed Secretary of War by President Jefferson and served from March 4, 1801, to March 7, 1809; appointed collector of the port of Boston by President Madison in 1809, which position he held until January 27, 1812, when he was appointed senior major general in the United States Army; was in command at the capture of York (now Toronto) April 27, 1813, and Fort George May 27, 1813; recalled from the frontier July 6, 1813, and placed in command of the city of New York; appointed Minister Plenipotentiary to Portugal by President Monroe and served from May 7, 1822, to June 30, 1824, when, by his own request, he was recalled; returned to Roxbury, Mass., where he died June 6, 1829; interment in Forest Hills Cemetery, Boston, Mass.

Bibliography

Erney, Richard Alton. *The Public Life of Henry Dearborn. 1957. Reprint, New York: Arno Press, 1979.*

This document is based on the 1992 version of the *Secretaries of War and Secretaries of the Army* book.

Mr. West and Mr. Caldera were added the last time we updated this electronic document. Future updates will be accomplished as resources permit.

SECRETARIES OF WAR

———-AND———

SECRETARIES OF THE ARMY

Portraits & Biographical Sketches

by

William Gardner Bell

CENTER OF MILITARY HISTORY
UNITED STATES ARMY
WASHINGTON, D.C., 1992

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Secretaries of the Army

Appendix

Since 1992

page updated 22 May 2001

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Henry Dearborn

HENRY DEARBORN was born in Hampton, New Hampshire, on 23 February 1751; studied medicine under Dr. Hall Jackson at Portsmouth; married Mary Bartlett, his first wife, in 1771; entered practice as a physician in 1772; was elected captain of a militia company; participated in the Battle of Bunker Hill, served under Benedict Arnold in the Quebec expedition and was captured, 1775; was paroled in 1776 and exchanged in 1777; was appointed major of the 3d New Hampshire Regiment; participated in operations at Ticonderoga and Freeman's Farm with the 1st New Hampshire Regiment; spent the winter of 1777–1778 at Valley Forge; took part in the Battle of Monmouth, 1778; engaged in the 1779 operations against the Six Nations; married his second wife, Dorcas Marble, in 1780; joined Washington's staff as deputy quartermaster general; commanded the 1st New Hampshire at Yorktown in 1781; returned to private life in Maine, 1783; was appointed brigadier and major general of militia; was appointed U.S. Marshal for the District of Maine, 1790; served in the U.S. House of Representatives, 1793–1797; served as Secretary of War, 5 March 1801–7 March 1809; helped plan the removal of the Indians beyond the Mississippi; was appointed Collector of the Port of Boston, 1809; was appointed senior major general in the U.S. Army, 1812; was ineffective in command of the northeastern theater in the War of 1812; captured York (Toronto) and Fort George (Quebec) in 1813; was transferred to command in New York City in 1813; married his third wife, Sarah Bowdoin; was nominated and withdrawn for the post of Secretary of War; served as minister to Portugal, 1822–1824; died in Roxbury, Massachusetts, on 6 June 1829.

The Artist

Walter M. Brackett (1823–1919), the Boston artist, became actively engaged in Secretary of War Belknap's plans for an Army portrait gallery, and painted four of the secretary's earliest predecessors—Pickering, Dexter, Dearborn, and Eustis—in 1873. Only Daniel Huntington, Robert W. Weir, and Henry Ulke exceeded his output. Fittingly, his subjects were all residents of Massachusetts. His Pickering portrait is in the West Point collection.

[28]

HENRY DEARBORN
Jefferson Administration
By Walter M. Brackett
Oil on canvas, 29" x 24", 1873

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page created 1 March 2001

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From James Madison to William Eustis, 7 March 1809

To William Eustis

Sir, Washington March 7th. 1809

The enclosed commission will inform you that I have taken the liberty to nominate you to fill the Office of Secretary of War, vacated by the resignation of General Dearborn, and that the Senate have compleated the appointment. I transmit the Commission with a hope that I shall have the pleasure of learning that your Country will have the benefit of your services in that important station. I need not add, what your partriotism [*sic*] will suggest, that it is desirable, its duties should be entered upon with as little delay as may be consistent with the arrangements preparatory to your removal to the seat of Government. With very high respect I am Sir, your Obt Servt.

J. M

FC (DLC). In a clerk's hand.

SOURCE PROJECT	Madison Papers
TITLE	From James Madison to William Eustis, 7 March 1809
AUTHOR	Madison, James
RECIPIENT	Eustis, William
DATE	7 March 1809
CITE AS	"From James Madison to William Eustis, 7 March 1809," *Founders Online,* National Archives, last modified June 13, 2018, http://founders.archives.gov/documents/Madison/03-01-02-0028. [Original source: *The Papers of James Madison*, Presidential Series, vol. 1, *1 March–30 September 1809*, ed. Robert A. Rutland, Thomas A. Mason, Robert J. Brugger, Susannah H. Jones, Jeanne K. Sisson, and Fredrika J. Teute. Charlottesville: University Press of Virginia, 1984, p. 26.]

Founders Online

[Back to normal view]

To James Madison from William Eustis, 18 March 1809

From William Eustis

Sir, Boston March (18th 1809.)

Being absent from town I did not (rec)eive untill the evening of the 15th. your Letter of the 7th instant accompanied with a Commission of Secretary to the war department.[1] Impressed with a just sense of the honor conferred on me by this distinguished mark of your confidence, and by the very obliging manner in which it was communicated, I have delayed an answer no longer than was necessary to contemplate the importance and high responsibility of the station, the inadequacy of my own powers and the implied change in my occupation and habits of life. An apprehension that my health could not be preserved thro' a summer-residence at Washington presented itself as a principal objection. Trusting to the probability that the exigencies of the public service may render such a residence not indispensable I will come to the duties of the office with such means and talents as I possess and with the hope that in the course of their application there may arise no just cause for censure from the public and no regret on your part that the appointment has been thus bestowed.

In a very few days it is my intention to leave this place—to enquire into the state of the public works at N. York agreeably to an injunction conveyed to me by the Secretary of State and to proceed immediately to Washington. I am with every sentiment of true respect, your most obedient and most humble servant

William Eustis.

RC (DLC). Docketed by JM, "recd. Mar 24."

1. Eustis was confirmed as secretary of war on 7 Mar. 1809 (*Senate Exec. Proceedings*, 2:118, 120).

SOURCE PROJECT	Madison Papers
TITLE	To James Madison from William Eustis, 18 March 1809
AUTHOR	Eustis, William
RECIPIENT	Madison, James
DATE	18 March 1809
CITE AS	"To James Madison from William Eustis, 18 March 1809," *Founders Online,* National Archives, last modified June 13, 2018, http://founders.archives.gov/documents/Madison/03-01-02-0070. [Original source: *The Papers of James Madison*, Presidential Series, vol. 1, *1 March–30 September 1809*, ed. Robert A. Rutland, Thomas A. Mason, Robert J. Brugger, Susannah H. Jones, Jeanne K. Sisson, and Fredrika J. Teute. Charlottesville: University Press of Virginia, 1984, p. 66.]

EXHIBIT C

HISTORICAL APPOINTMENTS[1]

Recess Appointments (5)

1. 10/22/1816 to 12/10/1817: George Graham, Chief Clerk, temporarily appointed Secretary of War. (BD)[2]
2. 09/01/1823 to 09/16/1823: John Rodgers, Commodore (Navy) and President of the Board of Navy Commissioners, temporarily appointed Secretary of the Navy. (BD)
3. 05/12/1831 to 05/23/1831: John Boyle, Chief Clerk, temporarily appointed Secretary of the Navy. (BD)
4. 06/20/1831 to 07/21/1831: Phillip G. Randolph, Chief Clerk, temporarily appointed Secretary of War. (BD)
5. 06/21/1831 to 08/07/1831: Asbury Dickins, Chief Clerk, temporarily appointed Secretary of Treasury. (AD)

Acting Appointment While Secretary Is Indisposed (145)

1. 02/17/1809 to 04/08/1809: John Smith, Chief Clerk, temporarily acting as Secretary of War. (BD) New administration 3/04/1809; successor nominated 3/06/1809 (2 days later); confirmed 3/07/1809 (1 day after nomination); entered upon duties 4/08/1809.
2. 03/08/1809 to 05/15/1809: Charles W. Goldsborough, Chief Clerk, temporarily appointed Secretary of the Navy. (BD)
3. 11/23/1819: Christopher Vanderventer, Chief Clerk, temporarily acting as Secretary of War. (AJ)
4. 04/24/1829 to 05/26/1829: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of Treasury. (AD)
5. 07/07/1829: William B. Lewis temporarily acting as Secretary of War. (AJ)
6. 07/08/1829: Richard H. Bradford temporarily acting as Secretary of the Navy. (AJ)
7. 08/19/1829: William B. Lewis temporarily acting as Secretary of War. (AJ)

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[1] This appendix is compiled from information found in the following sources, cited by the Government, with abbreviations used herein noted in parentheticals: *Trial of Andrew Johnson, President of the United States, Before the Senate of the United States, on Impeachment by the House of Representatives for High Crimes and Misdemeanors* (Gov't Printing Office 1868) (AJ); *Biographical Directory of the American Congress: 1774-1971* (Gov't Printing Office 1971) (BD); *In re Asbury Dickins*, 34th Cong., 1st Sess., Rep. C.C. 9 (Ct. Cl. 1856) (AD); *In re Cornelius Boyle*, 34th Cong., 3d Sess., Rep. C.C. 44 (Ct. Cl. 1857) (CB).

[2] Full date ranges are provided when contained in the source material. Otherwise, only start dates of the temporary appointment are shown.

8. 11/07/1829: Phillip G. Randolph, Chief Clerk, temporarily acting as Secretary of War. (AJ)
9. 06/12/1830: Phillip G. Randolph, Chief Clerk, temporarily acting as Secretary of War. (AJ)
10. 03/08/1831: Phillip G. Randolph, Chief Clerk, temporarily acting as Secretary of War. (AJ)
11. 03/21/1831 to 04/14/1831: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (CB)
12. 06/16/1831 to 06/23/1831: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (CB)
13. 08/10/1831: Daniel Brent, Chief Clerk, temporarily acting as Secretary of State. (AJ)
14. 08/10/1831 to 09/20/1831: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (CB)
15. 10/18/1831 to 10/26/1831: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of Treasury. (AD)
16. 03/15/1832 to 03/30/1832: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of Treasury. (AD)
17. 06/08/1832: John Robb, Chief Clerk, temporarily acting as Secretary of War. (AJ)
18. 07/16/1832: John Robb, Chief Clerk, temporarily acting as Secretary of War. (AJ)
19. 07/18/1832: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)
20. 07/21/1832: Daniel Brent, Chief Clerk, temporarily acting as Secretary of State. (AJ)
21. 07/23/1832: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (CB)
22. 10/01/1832 to 10/10/1832: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of Treasury. (AD)
23. 11/08/1832 to 11/17/1832: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of Treasury. (AD)
24. 11/12/1832: John Robb, Chief Clerk, temporarily acting as Secretary of War. (AJ)
25. 03/28/1833: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (CB)
26. 05/06/1833 to 05/09/1833: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of Treasury. (AD)
27. 05/06/1833: John Robb, Chief Clerk, temporarily acting as Secretary of War. (AJ)
28. 05/29/1833 to 05/31/1833: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of Treasury. (AD)
29. 06/13/1833: Daniel Brent, Chief Clerk, temporarily acting as Secretary of State. (AJ)

30. 06/05/1833: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (CB)
31. 06/05/1833: Daniel Brent, Chief Clerk, temporarily acting as Secretary of State. (AJ)
32. 06/06/1833: John Robb, Chief Clerk, temporarily acting as Secretary of War. (AJ)
33. 06/13/1833: Daniel Brent, Chief Clerk, temporarily acting as Secretary of State. (AJ)
34. 07/18/1833: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)
35. 07/21/1833: Daniel Brent, Chief Clerk, temporarily acting as Secretary of State. (AJ)
36. 08/10/1833 to 08/24/1833: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of State. (AD)
37. 09/28/1833: John Robb, Chief Clerk, temporarily acting as Secretary of War. (AJ)
38. 11/11/1833 to 11/15/1833: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of State. (AD)
39. 05/08/1834: Mahlon Dickerson temporarily acting as Secretary of War. (AJ)
40. 07/05/1834: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (CB)
41. 07/08/1834: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of State. (AJ)
42. 10/11/1834 to 10/31/1834: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of State. (AD)
43. 05/02/1835 to 06/13/1835: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of State. (AD)
44. 05/07/1835 to 06/17/1835: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (CB)
45. 05/18/1835: Carey A. Harris, Chief Clerk, temporarily acting as Secretary of War. (AJ)
46. 07/01/1835: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)
47. 07/06/1835 to 07/13/1835: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of State. (AD)
48. 08/31/1835 to 09/08/1835: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of State. (AD)
49. 09/28/1835 to 10/19/1835: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of State. (AD)
50. 10/20/1835: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)
51. 10/23/1835: Carey A. Harris, Chief Clerk, temporarily acting as Secretary of War. (AJ)
52. 04/29/1836: Carey A. Harris, Chief Clerk, temporarily acting as Secretary of War. (AJ)

53. 05/19/1836 to 05/23/1836: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of State. (AD)

54. 05/27/1836: Carey A. Harris, Chief Clerk, temporarily acting as Secretary of War. (AJ)

55. 07/07/1836 to 08/29/1836: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of State. (AD)

56. 07/09/1836: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (CB)

57. 09/27/1836 to 11/09/1836: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of State. (AD)

58. 06/28/1837: Aaron O. Dayton, Chief Clerk, temporarily acting as Secretary of State. (AJ)

59. 07/13/1837 to 07/31/1837: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (CB)

60. 10/20/1837: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

61. 10/27/1837: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (AJ)

62. 07/01/1838: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

63. 07/21/1838: Aaron Vail, Chief Clerk, temporarily acting as Secretary of State. (AJ)

64. 07/21/1838: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (AJ)

65. 10/06/1838 to 11/05/1838: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (CB)

66. 04/24/1839: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

67. 06/08/1839: Aaron Vail, Chief Clerk, temporarily acting as Secretary of State. (AJ)

68. 06/15/1839: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

69. 08/28/1840: J.L. Martin, Chief Clerk, temporarily acting as Secretary of State. (AJ)

70. 10/16/1840: J.L. Martin, Chief Clerk, temporarily acting as Secretary of State. (AJ)

71. 03/19/1841: John D. Simms, Chief Clerk, temporarily acting as Secretary of the Navy. (AJ)

72. 04/27/1841: Daniel Fletcher Webster, Chief Clerk, temporarily acting as Secretary of State. (AJ)

73. 08/20/1841: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

74. 09/13/1841 to 09/13/1841: McClintock Young, Chief Clerk, temporarily appointed Secretary of Treasury. (BD)

75. 09/14/1841 to 10/13/1841: Selah R. Hobbie, First Assistant Postmaster General, temporarily appointed Postmaster General. (BD)

76. 10/20/1841: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

77. 10/30/1841: McClintock Young, Chief Clerk, temporarily appointed Secretary of Treasury. (AJ)

78. 05/14/1842: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

79. 06/07/1842: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

80. 06/30/1842: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

81. 07/20/1842: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

82. 12/14/1842: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

83. 11/01/1842: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

84. 05/31/1843: Samuel Hume Porter temporarily acting as Secretary of War. (AJ)

85. 06/08/1843: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

86. 06/08/1843: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

87. 06/21/1843 to 06/24/1843: William S. Derrick, Chief Clerk, temporarily appointed Secretary of State. (BD)

88. 08/17/1843: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

89. 08/28/1843: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

90. 09/28/1844: Richard K. Cralle, Chief Clerk, temporarily acting as Secretary of State. (AJ)

91. 03/31/1846: Nicholas P. Trist, Chief Clerk, temporarily acting as Secretary of State. (AJ)

92. 09/02/1846: Nicholas P. Trist, Chief Clerk, temporarily acting as Secretary of State. (AJ)

93. 10/07/1846: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

94. 03/04/1847: Nicholas P. Trist, Chief Clerk, temporarily acting as Secretary of State. (AJ)

95. 03/31/1847: Nicholas P. Trist, Chief Clerk, temporarily acting as Secretary of State. (AJ)

96. 07/21/1847: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

97. 08/04/1847: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

98. 10/15/1847: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

99. 12/09/1847: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

100. 04/10/1848: John Appleton, Chief Clerk, temporarily acting as Secretary of State. (AJ)

101. 05/26/1848: Archibald Campbell, Chief Clerk, temporarily acting as Secretary of War. (AJ)

102. 08/17/1848: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

103. 10/01/1849: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

104. 10/08/1849: John D. McPherson, Chief Clerk, temporarily acting as Secretary of War. (AJ)

105. 06/20/1850: John McGinnis, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

106. 10/04/1850: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

107. 10/07/1850: Allen A. Hall temporarily acting as Secretary of Treasury. (AJ)

108. 12/06/1850: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

109. 12/23/1850: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

110. 03/01/1851: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

111. 03/31/1851: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

112. 05/10/1851: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

113. 06/16/1851: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

114. 06/20/1851: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

115. 07/14/1851: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

116. 08/04/1851: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

117. 09/13/1851: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

118. 11/26/1851: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

119. 02/20/1852: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

120. 02/21/1852: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

121. 03/01/1852: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

122. 03/19/1852: William Hunter, Chief Clerk, temporarily acting as Secretary of State. (AJ)

123. 04/26/1852: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

124. 05/01/1852: William Hunter, Chief Clerk, temporarily acting as Secretary of State. (AJ)

125. 05/24/1852: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

126. 06/10/1852: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

127. 07/06/1852: William Hunter, Chief Clerk, temporarily acting as Secretary of State. (AJ)

128. 08/27/1852: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

129. 10/04/1852: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

130. 10/28/1852: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

131. 12/31/1852: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

132. 01/15/1853: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

133. 03/03/1853: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

134. 07/11/1853: Peter G. Washington, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

135. 09/23/1853: Peter G. Washington, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

136. 04/12/1854: Peter G. Washington, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

137. 08/21/1854: William Hunter, Chief Clerk, temporarily acting as Secretary of State. (AJ)

138. 08/29/1854: Archibald Campbell, Chief Clerk, temporarily acting as Secretary of War. (AJ)

139. 10/05/1854: Peter G. Washington, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

140. 10/30/1854: Archibald Campbell, Chief Clerk, temporarily acting as Secretary of War. (AJ)

141. 05/03/1855: Peter G. Washington, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

142. 08/06/1855: Peter G. Washington, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

143. 10/09/1855: Archibald Campbell, Chief Clerk, temporarily acting as Secretary of War. (AJ)

144. 01/19/1857: Archibald Campbell, Chief Clerk, temporarily acting as Secretary of War. (AJ)

145. 07/05/1859: William R. Drinkard, Chief Clerk, temporarily acting as Secretary of War. (AJ)

Exigencies (23)

1. 01/07/1813 to 01/18/1813: Charles W. Goldsborough, Chief Clerk, temporarily acting as Secretary of the Navy. Exigency: Paul Hamilton resigned as Secretary of Navy during the War of 1812. (BD) Successor nominated 1/08/1813 (next day); confirmed 1/12/1813 (4 days after nomination); entered upon duties 1/19/1813.

2. 12/02/1814 to 01/16/1815: Benjamin Homans, Chief Clerk, temporarily acting as Secretary of the Navy. Exigency: William Jones resigned as Secretary of Navy during the War of 1812. (BD) Successor nominated 12/15/1814 (13 days later); confirmed 12/19/1814 (4 days after nomination); entered upon duties 1/16/1815.

3. 03/04/1817 to 03/10/1817: John Graham, Chief Clerk, temporarily acting as Secretary of State. (BD) Exigency: change in administration. Successor nominated and confirmed 3/05/1817 (next day); entered upon duties 9/22/1817. Attorney General appointed *ad interim* on 3/10/1817.

4. 03/04/1825 to 03/07/1825: Daniel Brent, Chief Clerk, temporarily acting as Secretary of State. (BD) Exigency: change in administration. Successor nominated 3/05/1825 (next day); confirmed and entered upon duties 3/07/1825 (2 days after nomination).

5. 03/04/1829 to 03/09/1829: Charles Hay, Chief Clerk, temporarily acting as Secretary of the Navy. (BD) Exigency: change in administration. Successor nominated, confirmed, and entered upon duties 3/09/1829 (5 days later).

6. 03/04/1829 to 03/28/1829: James A. Hamilton temporarily acting as Secretary of State. (BD) Exigency: change in administration. Successor nominated and confirmed 3/06/1829 (2 days later); entered upon duties 3/28/1829.

7. 06/25/1834 to 07/01/1834: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. Exigency: Senate rejected cabinet nominee for the first time in U.S. history. (BD) Successor nominated and confirmed 6/27/1834 (2 days later); entered upon duties 7/01/1834.

8. 03/04/1841 to 03/05/1841: J.L. Martin, Chief Clerk, temporarily acting as Secretary of State. (BD) Exigency: change in administration. Successor nominated, confirmed, and entered upon duties 3/05/1841 (next day).

9. 03/04/1841 to 03/05/1841: John D. Simms, Chief Clerk, temporarily acting as Secretary of the Navy. (BD) Exigency: change in administration. Successor nominated, confirmed, and entered upon duties 3/05/1841 (next day).

10. 03/04/1841 to 03/05/1841: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (BD) Exigency: change in administration. Successor nominated, confirmed, and entered upon duties 3/05/1841 (next day).

11. 03/04/1841 to 03/08/1841: Selah R. Hobbie, First Assistant Postmaster General, temporarily acting as Postmaster General. (BD) Exigency: change in administration. Successor nominated 3/05/1841 (next day); confirmed 3/06/1841 (1 day after nomination); entered upon duties 3/08/1841.

12. 09/11/1841 to 10/11/1841: John D. Simms, Chief Clerk, temporarily acting as Secretary of the Navy. Exigency: George E. Badger resigned as Secretary of the Navy with

several other members of the cabinet in protest when President Tyler vetoed Whig initiatives. (BD) Successor nominated 9/11/1841 (same day); confirmed 9/13/1841 (2 days after nomination); entered upon duties 10/11/1841.

13. 09/12/1841 to 10/12/1841: Albert M. Lee, Chief Clerk, temporarily acting as Secretary of War. Exigency: John Bell resigned as Secretary of War with several other members of the cabinet in protest when President Tyler vetoed Whig initiatives. (BD) Successor recess appointed 10/12/1841 (30 days later).

14. 03/01/1843 to 03/08/1843: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. Exigency: Walter Forward resigned as Secretary of Treasury in protest. (BD) Failed nomination 3/02/1843 (next day); rejected 3/03/1843 (1 day after nomination); successor nominated and confirmed 3/03/1843 (same day as previous nomination rejected); entered upon duties 3/08/1843.

15. 05/02/1844 to 07/04/1844: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. Exigency: The previous Secretary of Treasury John Spencer died in office. (BD) Failed nomination 6/14/1844 (43 days later); rejected 6/15/1844 (1 day after nomination); successor nominated and confirmed 6/15/1844 (same day as previous nomination rejected); entered upon duties 7/04/1844.

16. 03/06/1849 to 03/08/1849: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (BD) Exigency: change in administration. Successor nominated 3/06/1849; confirmed 3/07/1849 (next day); commissioned and entered upon duties 3/08/1849 (1 day after nomination).

17. 03/06/1849 to 03/08/1849: Selah R. Hobbie, First Assistant Postmaster General, temporarily acting as Postmaster General. (BD) Exigency: change in administration. Successor nominated 3/06/1849 (same day); confirmed 3/07/1849 (1 day after nomination); commissioned and entered upon duties 3/08/1849.

18. 07/23/1850 to 08/15/1850: Daniel C. Goddard, Chief Clerk, temporarily acting as Secretary of Interior. (BD) Exigency: change in administration. Successor nominated, confirmed, and entered upon duties 8/15/1850 (23 days later).

19. 07/23/1850 to 07/24/1850: Samuel J. Anderson, Chief Clerk, temporarily acting as Secretary of War. (BD) Exigency: change in administration. Winfield Scott, Major General (Army), was appointed *ad interim* 7/24/1850 (1 day later).

20. 08/27/1850 to 09/16/1850: Daniel C. Goddard, Chief Clerk, temporarily acting as Secretary of Interior. Exigency: Thomas M. T. McKennan resigned as Secretary of Interior after 11 days, citing his nervous temperament. (BD) Successor nominated 9/11/1850 (15 days later); confirmed 9/12/1850 (1 day after nomination); entered upon duties 9/16/1850.

21. 03/04/1853 to 03/07/1853: William Hunter, Chief Clerk, temporarily acting as Secretary of State. (BD) Exigency: change in administration. Successor nominated, confirmed, and entered upon duties 3/07/1853 (3 days later).

22. 03/09/1859 to 03/14/1859: Horatio King, First Assistant Postmaster General, temporarily acting as Postmaster General. Exigency: The previous Postmaster General Aaron Brown

died in office. (BD) Successor nominated and confirmed 3/09/1859 (same day); commissioned and entered upon duties 3/14/1859 (5 days later).

23. 12/15/1860 to 12/17/1860: William Hunter, Chief Clerk, temporarily acting as Secretary of State. Exigency: Lewis Cass resigned as Secretary of State in protest. (BD) Successor nominated 12/16/1860 (next day); confirmed 12/17/1860 (1 day after nomination); entered upon duties same day.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BARRY MICHAELS,

Plaintiff,

v.

MATTHEW G. WHITAKER, IN HIS OFFICIAL CAPACITY,

Defendant.

Case No. 18-cv-2906

* * * * * * * * * * * * *

[PROPOSED] EXPEDITED SCHEDULING ORDER FOR PLAINTIFF'S EMERGENCY MOTION FOR PRELMINARY INJUNCTION

Plaintiff filed his complaint and an emergency motion for preliminary injunction on Tuesday, December 11, 2018. The Court sets the following schedule for consideration of plaintiff's emergency motion:

(a) Defendant will file his response by Thursday, December 13, 2018, at 5:00 PM;

(b) Plaintiff will file his reply by Friday, December 14, 2018, at 9:00 AM;

(c) A hearing on plaintiff's emergency motion will be held before the Honorable _____, at the E. Barrett Prettyman United States Courthouse, 333 Constitution Ave. N.W., Washington, DC 20001, in Courtroom _____, on Friday, December 14, 2018, at _____.

IT IS SO ORDERED.

Dated: December ___, 2018

_____
United States District Judge

Names and addresses of attorneys and/or parties entitled to be notified of the entry of this order:

Attorneys for Plaintiff Barry Michaels:
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Defendant:
Matthew G. Whitaker, in his official capacity
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BARRY MICHAELS,

Plaintiff,

v.

MATTHEW G. WHITAKER, IN HIS OFFICIAL CAPACITY,

Defendant.

Case No. 18-cv-2906

* * * * * * * * * * * * *

[PROPOSED] ORDER GRANTING PLAINTIFF'S
EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

On full consideration of plaintiff's emergency motion for injunction and memorandum in support, and for the reasons set forth on the record on December __, 2018, the motion is GRANTED. Matthew G. Whitaker is ENJOINED from:

(a) Exercising authority as Acting Attorney General; and

(b) Supervising the Department of Justice's response to plaintiff's pending petition for writ of certiorari and subsequent briefing in the U.S. Supreme Court on the merits of the case.

IT IS SO ORDERED.

Dated: December ___, 2018

_____
United States District Judge

Names and addresses of attorneys and/or parties entitled to be notified of the entry of this order:

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